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Happell and Panchapakesa Sastry, JJ. Puvvuda Venkatasubbaya *v.* Attar Sheikh Marian.

7th April 1948. L.P.A. No. 13 of 1947.

Contract—Illegality—Abkari contract conferring benefit on person other than licencee—Enforceability—Monies paid under agreement—Recoverability.

The plaintiff alleged that certain toddy shops were bought in the names of the defendants for his benefit and that the agreement between the parties provided, among other things, that he should manage the shops and enjoy the profits therefrom. The plaintiff having sued the defendants for recovery of damages for breach of the agreement,

Held, that the agreement which formed the foundation of the plaintiff's claim was illegal and that plaintiff was therefore not entitled to recover anything from the defendant.

Held further, that the plaintiff could not under section 65 of the Contract Act recover the monies paid by him to the defendants in as much as the parties were *in pari delicto.*

Konda Kottayya for Appellant.

M. S. Ramachandra Rao for Respondent.

B.V.V. ——— *Appeal dismissed.*

The Officiating Chief Justice Chaganty Katamraju *v.* Madavarapur Paripurnanandam.

9th April, 1948. C.M.P. No. 172 of 1947.

Civil Procedurr Code (*V of* 1908), *sections* 152 *and* 153 *and Order* 6, *rule* 17—*Misdescription of property in plaint and decree—Wrong survey number given—Decree confirmed by High Court in Second Appeal—Application to correct plaint schedule and decree—Maintainability.*

The petitioner was the plaintiff in a suit for recovery of several items of property. The plaint schedule however contained an erroneous description of the property in giving the survey number. The suit having been decreed the matter was taken up finally to the High Court in Second Appeal and the decree was confirmed. The plaintiff subsequently filed an application to the High Court to have the plaint Schedule and the decree corrected by inserting the correct survey number of the property.

Held, that the application to correct the error was maintainable under sections 152 and 153, Civil Procedure Code and that it could not be treated as an application under Order 6, rule 17 of the Code.

P. Somasundaram for Petitioner.

V. S. Sastri for Respondent.

B.V.V. ——— *Petition allowed.*

Happell, J. Vepa Nagasurya *v.* Bhavannarayana.
19th April, 1948. C.R.P. No. 159 of 1947.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 19 *and* 20—*Decree against joint family—Subsequently born member—Right to apply under section* 20.

Section 20 of Madras Act IV of 1938 is really ancillary to section 19 of the said Act and therefore the expression " on application " in section 20 should be construed as meaning " on an application by a person entitled to the benefits of section 19." Where a mortgage decree was passed against the joint family of the petitioner who was born subsequent to the passing of the decree, and the latter applied for relief under section 20,

Held, that the application was legally sustainable.

T. S. Narasinga Rao and *M. Balachandrudu* for Petitioner.

Respondent not represented.

B.V.V. *Petition allowed.*

Panchapakesa Sastry, J. Madhavi Amma *v.* Padmanabhan.
19th April, 1948. A.A.O. No. 274 of 1945.

Civil Procedure Code (V of 1908), *Order* 40, *rule* 4 (2) (*Madras*)—*Receiver—Direction of Court to put into Court monies in his hands—Appeal—Maintainability.*

An order of Court directing the receiver to pay into Court monies in his hands which have been received by him in due course of administration falls under Order 40, rule 4 (2), Civil Procedure Code, and is appealable.

K. Kuttikrishna Menon for Appellant.

D. A. Krishna Variar and *D. H. Nambudripad* for Respondent.

B.V.V. *Appeal and Memo of Objections dismissed.*

Satyanarayana Rao, J. Ehahub Hameed *v.* Central Talkies Ltd.
23rd April, 1948. S.A. No. 2601 of 1947.

Trade name—Naming of picture house—Prior user—Registration under section 11, *Companies Act—Effect—Prior use of name among members of public—Right to protection.*

The principal question to be considered under section 11 of the Companies Act is analogous to the question which arises in an ordinary passing off action. It is wrong to assume that the section creates exclusive right to or exclusive property in the use of a name regardless of the question whether the name was calculated to deceive or not. Where there is an old established company or a firm which is not registered under the Companies Act and a new Company intends to get itself registered under the Act with a name similar to the old company it cannot be said that the old company has no right to the sole use of the name. The question should not in such a case be decided merely on the basis of registration under the Companies Act but should be decided on the evidence relating to the use of the name among the public and the confusion it is likely to cause by reason of similarity of names.

A. V. Viswanatha Sastri and *S. Amudachari for* Appellant.

T. M. Krishnaswami Aiyar and *G. Gopalaswami* for Respondent.

B.V.V. *Case remanded.*

Govindarajachari, J. Kumaraswami *v.* Mahalakshmamma.
8th April, 1948. A. A. O. Nos. 51 and 128 of 1946.

Madras Agriculturists' Relief Act (IV of 1938), *section* 7—*Decree put in execution—Sale held—Decree subsequently scaled down in appeal—Setting aside sale.*

Where a sale has been held in execution of a decree which is subsequently scaled down in appeal the sale is not liable to be set aside if it would have been held even if the Court of first instance had decreed the amount eventually found due in appeal.

It is open to an executing Court to execute the decree as it stands, and a sale held on foot of a decree which is not then scaled down but ultimately turns out to be one which is liable to be scaled down, is not invalid as offending against section 7 of Madras Act IV of 1938.

(1947) 1 M.L.J. 369, relied on.

B. Srinivasamurthi for Appellant.

P. Somasundaram for Respondent.

B.V.V. *Appeal dismissed.*

Govindarajachari, J. Eacharan Nair *v.* Abdul Muthalif.
9th April, 1948. C. R. P. No. 1014 of 1946.

Provincial Insolvency Act (V of 1920), *section* 47—*Mortgage debt—Proof in insolvency—When necessary.*

A secured debt is not ordinarily provable in insolvency and it is provable only in the three contingencies contemplated by sub-sections (1), (2) and (3) of section 47. In other words except where a secured creditor realises his security or relinquishes it, or values it, he is not bound to prove his debt in the insolvency of his debtor.

I.L.R. 1942 Mad. 448, referred to.

C. Unikanda Menon for Petitioner.

D. A. Krishna Variar for Respondent.

B.V.V. *Petition dismissed.*

The Officiating Chief Justice and Satyanarayana Rao, J. Rajam Naidu and another *v.* Meenakshi Ammal and others.
16th April, 1948. L.P.A. No. 103 of 1946.

Civil Procedure Code (V of 1908), *section* 48—*Contingent liability of surety—Application to enforce after happening of contingency—Starting point of limitation—Limitation Act (IX of* 1908), *Article* 181.

Where under the terms of the surety bond there was a contingent liability on the surety, (namely, in the event of the mortgaged properties being sold and the deficiency ascertained,) and the application to enforce the liability of the surety was filed beyond twelve years from the date of the decree but within three years from the date when such deficiency was ascertained.

Held, that the application was within time both under section 48, Civil Procedure Code and Article 181 of the Limitation Act.

N R C

T. E. Ramabhadrachariar for Appellant.

T. R. Venkataraman for Respondent.

B.V.V. ——— *Appeal dismissed.*

Panchapakesa Sastry, J. Ratnaswami Padayachi *v.* Kuppuswami Aiyar and others
16th April, 1948. A. A. O. No. 79 of 1947

Civil Procedure Code (*V of* 1908), *section* 48—*Twelve years period expiring on holiday*—*Decree transferred for execution*—*Right of decree-holder to file execution petition next day.*

Where a decree was transferred to another Court for execution and the twelve years period prescribed by section 48 having expired on a Sunday on which day the Court was closed, the decree-holder filed his execution petition on the next day.

Held, that the petition was not barred by limitation. The principle that a party should not suffer for the act of the Court and that if there is no Court sitting on the last day when he could do any particular act he will be in time on the next day when the Court sits will apply to such a case.

K. Srinivasan for Appellant.

A. V. Viswanatha Sastri for Respondent.

B.V.V. ——— *Appeal dismissed.*

Govindarajachari, J. Krishnaswami Aiyangar *v.* Kuppuswami Naidu.
16th April, 1948. S.A. No. 2238 of 1945.

Madras Agriculturists' Relief Act (*IV of* 1938), *sections* 8 *and* 9—*Tracing back of debt*—*Nature of original debt*—*Debt due by joint family*—*Change of members*—*Effect.*

For the purpose of the application of the proviso to sub-section (1) of section 9, or of the Explanation to section 8 and in order to permit a tracing back of the debt to an earlier document, the earlier debt must also be one due from an agriculturist.

Under the Madras Agriculturists' Relief Act it does not matter how an undivided Hindu family may have been represented in the various documents succeeding each other so long as there is a single debt and the same person, namely, the joint family is the debtor. The situation is in no way altered or affected by a junior coparcener joining in the execution of a document in renewal of a family debt for which he was previously liable only as a member of a joint family.

A. Suryanarayaniah for Appellant.

T. E. Ramabhadrachariar and *M. S. Krishnaswami Aiyangar* for Respondent.

B.V.V. ——— *Appeal dismissed.*

Satyanarayana Rao, J. Krishnamma *v.* Chennayya.
20th April, 1948. C.R.P. No. 1506 of 1947.

Arbitration Act (*X of* 1940) *section* 17—*Award*—*Time for objections*—*Court no granting thirty days*—*Decree passed on basis of award*—*Validity*—*Appeal or revision.*

Where the lower Court granted only two days time for filing objections to an award from the date of the service of notice of the award and the party not having filed objections the Court passed a decree.

Held, that the Court acted illegally in the exercise of its jurisdiction in not giving thirty days time for the filing of the objections to the award and that the decree should be set aside in revision and the case remanded for disposal according to law.

Held, further, that the decree passed by the lower Court was not appealable.

I.L.R. 29 All. 584, not followed.

T. Satyanarayana for Petitioner.

K. Umamaheswaram for Respondent.

B.V.V. ——— *Petition allowed.*

Govindarajachari, J. Sriramulu *v.* Sait Lumbaji and another.
21st April, 1948. S.A. No. 2167 of 1945.

Execution sale—Delivery of possession—Objection by third party—Remedy by way of suit.

The decision of the Full Bench in *Abdul Azim* v. *Chokkam Chettiar,* (1935) 69 M.L.J. 821 : I.L.R. 58 Mad. 893 (F.B.), holds in substance that when a judgment-debtor does not object and a third party alone objects to the delivery of possession, there being no dispute or contest as between the decree-holder-auction-purchaser and the judgment-debtor the execution must be regarded as complete as between them and the further remedy of the decree-holder-auction-purchaser would thereafter be by a regular suit against the obstructor.

G. Balaparameswari Rao and *R. Venkat Rao* for Appellant.

P. Somasundaram for Respondents.

B.V.V. ——— *Appeal dismissed.*

Yahya Ali, J. Periyasami Padayachi and another *v.* Minor Ulaganathan.
21st April, 1948. C.R.P. No. 694 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 33, *rule* 1—*Application for leave to sue* in forma pauperis—*Question as to pecuniary jurisdiction of Court to entertain—Duty of Court to decide—Return of application for presentation to proper Court.*

When a petition is presented under Order 33, rule 1, Civil Procedure Code, for leave to sue *in forma pauperis,* and an objection as to the pecuniary jurisdiction is raised *in limine* the Court can go into the question of jurisdiction and if it finds it has no pecuniary jurisdiction over the matter it can return the application for presentation to the proper Court.

R. Rangachari for Petitioner.

K. S. Desikan and *K. Raman* for Respondent.

B.V.V. ——— *Petition allowed.*

Govinda Menon, J. *In re* Major F.K. Mistry.
21st April, 1948. Cr. M. P. No. 2092 of 1947.

Army Act (*VIII of* 1911), *sections* 68 *and* 69—*Criminal breach of trust in respect of army property—Forum for trial—Decision by military authority—Duty of Magistrate—Charge framed without jurisdiction—Quashing by High Court—Criminal Procedure Code* (*V of* 1898), *sections* 549 *and* 561-*A.*

Under the Indian Army Act, there is no express provision of law which takes away from the ordinary criminal Courts the right and power to inquire into and try an offence of criminal breach of trust whether committed with regard to army

property or other properties, or whether the delinquent is an Army personnel or an ordinary citizen. Where the offence is triable both by a Court martial and by the ordinary criminal Court, the military authority may decide before which Court the proceedings shall be instituted, but there is no compulsory duty cast on the military authority to decide the point. The decision of the military authority under section 69 of the Army Act need not be communicated to the Magistrate who is bound to follow the provisions of section 549, Criminal Procedure Code. The mere acquiescence on the part of the accused in the Court's failure to comply with the procedure prescribed under section 549 will not operate as a bar to his relying on the illegality.

Where the lower Court has acted without jurisdiction in framing a charge the High Court can quash the charge framed.

K. S. Jayarama Aiyar, P. Basi Reddi and *V. V. Radhakrishnan* for Respondent.

The Advocate-General (*K. Rajah Aiyar*) and The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V.

Petition allowed.

Govinda Menon, J.
22nd April, 1948.

Seenatta and others *v.* Anjaneyalu and another.
Cr.R.C. No. 447 of 1947.

Criminal Procedure Code (V of 1898), *section* 145 (1)—*Date for appearance not fixed by Magistrate—Order whether rendered void.*

The failure on the part of the Magistrate to state in the order to be served on the parties the date on which they were to appear and file a statement as contemplated by section 145 is not a vital defect making the order void and inoperative, especially when parties have appeared and taken part in the subsequent proceedings.

N. Somasundaram and *T. Lakshmiah* for Petitioners.

K. S. Jayarama Aiyar, T. S. Narasinga Rao and *M. Balachandrudu* for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V.

Petition dismissed.

Happell and Panchapakesa Sastry, JJ.
22nd April, 1948.

Ramanatha Aiyar *v.* Corporation of Madras.
O.S.A. No. 1 of 1946.

Madras City Municipal Act (IV of 1919)—*Licence fee—Amount—Reasonableness—Interference by Court when justified.*

In principle the licence fee should not include more than the cost of granting the licence and exercising such supervision as may be necessary to see that the terms of the licence are complied with. The question whether a share of the cost of sanitation and conservancy should be included in the licence fees charged in respect of a hotel is not really relevant. If however there is no want of good faith and the fee is not *ex facie* unreasonable, a Court will not examine minutely whether the fee charged is exactly commensurate with the cost of granting the licence and the cost of supervision in accordance with its terms.

V. Rajagopal Mudaliar for Appellant.

R. Rajeswara Rao instructed by *Dr. V. K. John* for Respondent.

B.V.V.

Appeal dismissed.

Horwill and Rajagopalan, JJ. Gopalakrishna Chetty *v.* Dorai Babu and others.
23rd April, 1948. O.S.A. No. 26 of 1946.

Hindu Law—Illegitimate son of Sudra—Death of father—Partition among members of family—Right to share or maintenance.

An illegitimate son of a Sudra is not a coparcener with the putative father and his collaterals and therefore he cannot claim a share in the family partition effected among members of the family after the death of his father. His only right in such a case is to claim maintenance. And even an offspring by adulterous and incestuous intercourse is entitled to maintenance from the father's estate as well as from the estate of the coparcenary of which the father was a member.

K.S. Sankara Aiyar, A. Kuppuswami Aiyangar and *A. Ramachandran* for Appellant.

N. Rajagopalan, A. Narasimhachariar and *A. Sundarachariar* for Respondents.

B.V.V. *Appeal dismissed.*

Yahya Ali, J. Muhammad Ali *v.* Badi Bi.
4th May, 1948. S. A. No. 1330 of 1946.

Mahomedan Law—Religious institution—Mujavar of Durgah—Women whether excluded from holding office—Custom as to exclusion—Burden of proof.

The question whether a woman is precluded from holding an office connected with a religious endowment is essentially one depending upon the custom of the institution as there is nothing in Mahomedan Law prohibiting a woman as such from occupying any such office. Upon the general basis of the custom of seclusion however and the particular nature of duties to be performed a woman may not hold the office of Sajjadanashin where there is a superior who has to impart instruction and guide disciples. A similar restriction obtains with regard to the office of Peish Imam who has to lead the congregation. In all other cases there is no prohibition under the Muhammadan Law, but by reason of certain custom or usage of the institution a woman may be precluded. When such a custom is alleged, it is for the person who seeks to exclude women to prove the disqualification. Women held entitled to hold the hereditary office of Mujavar in the Barashahid Durgah in Nellore.

V. Venkatachari and *T. Rangaswami Aiyangar* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) and *G. Venkatarama Sastri* for Respondents.

B.V.V. *Appeal dismissed.*

Yahya Ali, J. Kondapatti Dasarathrama Reddi and others, *In re.*
5th May, 1948. Cr.M.P. Nos. 736 and 766 to 775 of 1948.

Madras Maintenance of Public Order Act (I of 1947), *section* 3*—Effect—Communication of particulars to person detained—Need for—Failure to give particulars—Illegality of detention.*

The most important safeguard that the Madras Maintenance of Public Order Act provides is the communication of the grounds and particulars, and with reference to the particulars it is incumbent upon the Provincial Government to furnish to the detenu such particulars as are sufficient to enable him to make a representation. It is thereafter that the Advisory Council gets opportunity to examine the case and make its report so as to enable the Provincial Government to pass final orders. If the primary step of furnising particulars is not duly complied with it

must necessarily follow that the continued detention of the concerned person is illegal.

Y. G. Krishnamoorthy for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V. ——— *Petitions allowed.*

Yahya Ali, J. Dr. Fida Hussain, *In re.*
19th May, 1948. Cr. M. P. No. 866 of 1948.

Madras Maintenance of Public Order Act (I of 1947), section 3—Statement of grounds and particulars as to detention—Vagueness—Institution declared unlawful and then dissolved—Detention of member.

The purpose of furnishing grounds and particulars under section 3 (1) of the Madras Maintenance of Public Order Act is to enable the detenu to make; if he wishes, a representation against the order and to clarify the charge against him with the hope that he may disabuse the appropriate authority. It is wholly futile to say that he is a member of an organisation which was lawful up to a point and which was dissolved as soon as the Government declared it to be unlawful, not disclosing that after it was declared to be unlawful anything was done by the detenu to show that he continued to act in his former capacity to the detriment of public peace. If taking cover under the enabling provision which protects facts of a particular confidential nature from disclosure, the Provincial Government merely conveys some harmless data it cannot be said that the requirement of section 3 is either in letter or spirit carried out.

B. Pocker for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V. ——— *Petition allowed.*

Yahya Ali, J. *In re* Ramaratnam.
20th May, 1948. Cr. M. P. No. 943 of 1948.

Madras Maintenance of Public Order Act (I of 1947)—Detention under—Grounds for—Person being member of communist party and criticising Government—Acts of violence not proved—Validity of detention.

Membership of a party, such as the communist party, which has not been declared unlawful is not by itself sufficient to justify an order of detention under the Madras Maintenance of Public Order Act of 1947, in the absence of anything more specific to indicate that by reason of that membership or in consequence thereof the member was acting or about to act in a manner prejudicial to public peace and public order. The petitioner who was previously an active worker in the Trade Union Congress and at present a member of the communist party was alleged to have strongly criticised the attitude of the Local Government on problems concerning labour and to have encouraged strikes but there was nothing to show that he committed or threatened to commit any overt acts of violence.

Held, that the detention of the petitioner under the Maintenance of Public Order Act was not legal.

A. Ramachandran for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V. ——— *Petition allowed.*

Yahya Ali, J. Sivagaminatha Pillai *v.* Venkitasami Naicker.
22nd April, 1948. C.R.P. No. 1270 of 1946.

Civil Procedure Code (V of 1908), *Order* 23, *Rule* 1 (2)—*Late stage—Evidence adduced by plaintiff—Application for withdrawal with liberty—Whether can be allowed.*

Where an appreciable portion of the material evidence had been adduced and the plaintiff finding that the evidence was insuffiicent to establish the case propounded by him in the plaint applied for withdrawal of the suit with liberty to file a fresh suit,

Held, that the application should be refused as such a course would be contrary to the letter and the spirit of sub-rule (2) of Rule 1 of Order 23, Civil Procedure Code.

U. Somasundaram for Petitioner.

C. S. Rajappa for Respondent.

B.V.V. *Petition allowed.*

Horwill and Rajagopalan, JJ. Raghavacharyulu *v.* Superintendent, Central Jail, Rajahmundry.
22nd April, 1948. Cr.M.P. No. 723 of 1948.

Madras Maintenance of Public Order Act (I of 1947), *section* 3—*Grounds for detention—Communication to detenu—Need for particulars.*

No time is fixed under section 3 of the Madras Maintenance of Public Order Act, 1947, for the communication of the grounds of detention to the detenu, but the communication must be within a reasonable time. The grounds on which the Order has been made must be furnished to the detenu with such other particulars as are in the Government's opinion sufficient to enable the detenu to make a representation against the order. It is possible for a District Magistrate or the Government to judge a man's future activities by his past; but the Government should state that his past actions indicated that his remaining at large was likely to be prejudicial to the public safety and the maintenance of public order.

S. Suryaprakasam and *P. V. Ramachandra Rao* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for Respondent.

B.V.V. *Petition allowed.*

Happell and *Panchapakesa Sastry, JJ.* Kunhotti *v.* Ammotti.
23rd April, 1948. S. A. No. 2151 of 1945.

Transfer of Property Act (IV of 1882), *section* 60—*Prior suit to enforce* kanom—*Decree for mortgage amount and compensation for improvements—Right of redemption—Fresh suit—Maintainability—Malabar Compensation for Tenants Improvements Act, sections* 5 *and* 6.

There is no indication in the Malabar Compensation for Tenants Improvements Act of the extinction of the right to redemption. Even if a decree is specifically passed in a suit to enforce a *kanom* for the mortgage amount and for compensation for improvements and arrears of rent the right of redemption will not be extinguished thereby. And a second suit for redemption of the kanom will lie notwithstanding the existence of the previous decree which has been allowed to become barred by limitation.

C. K. Viswanatha Aiyar for Appellant.

S. Venkatachala Sastri for Respondent.

B.V.V. *Appeal allowed.*

Satyanarayana Rao, J. Soma Reddi *v.* Someswara Reddi.
6th July, 1948. S. A. No. 2289 of 1945.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 8, 9 *and* 13—*Debt incurred after Act—Renewal of earlier debt—Scaling down—Doctrine of failure of consideration—Applicability.*

A debt incurred after the commencement of Madras Act IV of 1938, cannot be scaled down except in accordance with section 13 of the Act. But in a suit on such a debt the defendant can plead that the document executed after the commencement of the Act was a mere voucher acknowledging a debt incurred

prior to the commencement of the Act to which sections 8 and 9 of the Act would apply. If so much is pleaded and established the excess over the amount due under the prior document on applying sections 8 and 9 may be treated as an amount in respect of which there is a failure of consideration.

Kasturi Seshagiri Rao for Appellant.

C. Rangaswami Aiyangar for Respondent.

B.V.V. ——— *Case remanded.*

Satyanarayana Rao, J. Sikraji Bhikaji *v.* Kundanmal Pakraj.
8th July, 1948. S. A. No. 2285 of 1946.

Torts—Slander—Tom-tom that a party's goods were sold by auction—Whether actionable.

The plaintiff sued the defendant for damages for slander. The complaint was that the defendant got a tom-tom made in the following words : " S.B.'s goods (S.B., being the plaintiff)are being sold by public auction at 3 P.M., on 27th October 1949." The plaintiff's case was that the words used suggested the innuendo that the plaintiff was not solvent and that his goods were being brought to sale by auction by the creditor.

Held, that the words used did not contain the alleged innuendo and that the claim for damages was not sustainable.

The mere fact that the goods were being sold by auction without the addition that the goods were sold in pursuance of a decree or through the Official Receiver did not by itself suggest the inference that the goods were sold by auction because the owner of the goods did not pay his debts.

R. Thirumalai Thathachariar for Appellant.

Respondent not represented.

B.V.V. ——— *Appeal dismissed.*

Panchapakesa Sastry, J. Sheik Moideen Sahib and another *v.* Abdul Rahoof Saheb.
8th July, 1948. A. A. O. No. 69 of 1947.

Civil Procedure Code (V of 1908), *Order* 21, *rules* 98 *and* 103*—Suit to set aside summary order—Parties—Appeal against order of remand—Scope of enquiry.*

Under Order 21, rule 103, Civil Procedure Code there is a statutory right in favour of the persons against whom the order under rule 98 has been passed to file a suit to set aside the summary order. It is not necessary that other persons who may have an interest in the property along with the plaintiffs should be added as parties.

In an appeal against an order of remand it is not open to the appellate Court to consider the other points in controversy.

D. Ramaswami Aiyangar and *S. Kuppuswami* for Appellants.

N. *Sivaramakrishna Aiyar* and *A. Balasubramania Aiyar* for Respondents.

B.V.V. ——— *Case remanded.*

Satyanarayana Rao, J. Subba Reddi *v.* Narayanaswami Reddi.
13th July, 1948. C. M. P. Nos. 3369, 3370, 3627 and 3691 of 1948.

Civil Procedure Code (V of 1908), *sections* 24, 141 *and Order* 40, *rule* 1*—Application for transfer of suit to High Court—Notice served on defendants—Order for transfer not made—Application for appointment of receiver—Maintainability in High Court.*

When an application for the transfer of a suit to the High Court is made under section 24, Civil Procedure Code, and notice is ordered it is in the nature of an original proceeding within the meaning of section 141 of the Code and the procedure of the Court in regard to suits becomes applicable thereto. Order 40, rule 1 of the Code will be attracted by section 141 to such proceedings and the High Court will have power to appoint a receiver before the transfer of the suit was ordered and after notice on the petition for transfer was served on the defendants.

M. S. Ramachandra Rao for Petitioner in C. M. P. Nos. 3369 and 3370 of 1948 and for Respondent in C. M. Ps. Nos. 3627 and 3691 of 1948.

P. Somasundaram, P. Chandra Reddi and *O. Chinnappa Reddi* for Respondents in C. M. Ps. Nos. 3369 and 3370 of 1948 and Petitioner in C. M. P. Nos. 3627 and 3691 of 1948.

B.V.V. ——— *Order made.*

Happell and Panchapakesa Sastri, JJ. Adikesavalu Naidu *v.* Nanni-
8th April, 1948. Muthuswami Chetty.
L. P. A. No. 19 of 1947.

Mortgage—Sale to mortgagee ignoring intermediate mortgage—Sale of property in execution of decree obtained by intermediate mortgagee—First purchaser dispossessed—Suit on mortgage—Limitation—Starting point—Transfer of Property Act (IV of 1882), *section* 101.

Where the sale in plaintiff's favour turned out invalid because the prior mortgagee ignored altogether the puisne mortgagee and his rights and purported to deal with the mortgagor as if there was no intermediate encumbrance and the latter obtained the properties in auction in execution of his own decree on the mortgage,

Held, that the plaintiff could not plead a fresh cause of action in his favour on the original mortgage when the sale was declared invalid or when he was compelled to restore back possession.

Held further, that the plaintiff in such a case could only enforce his rights on the original mortgage under section 101, Transfer of Property Act within the time allowed by law for a suit on the mortgage.

M. S. Venkatarama Aiyar and *V. Natesan* for Appellant.

R. Thirumalai Thathachariar for Respondent.

B.V.V. ——— *Appeal allowed.*

Govinda Menon, J. Pechimuthu Thevar, *In re.*
2nd July, 1948. Crl. R. C. No. 152 of 1948.
(Crl. R. P. No. 144 of 1948).

Timber Transport Rules, rule 5—" *When demanded* "—*Grant of reasonable time for production of permit.*

The words " when demanded " in rule 5 of the Timber Transport Rules does not necessarily indicate that the production of the permit should be *eo instanti.* A reasonable time can be allowed for the production provided the timber is not taken out of the scheduled area within that period.

K. Veerasami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V. ——— *Petition allowed.*

Govindarajachari, J. Ummanath Bhandary and another *v.* Pedru Souza.
8th July, 1948. A. A. O. Nos. 124 and 125 of 1947.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 103—*Adverse claim order—Prior suit regarding same subject pending—Fresh suit if need be filed.*

When there is a suit or appeal filed by the defeated objector pending at thee time when the claim order is made, it is not obligatory on his part to file another suit after the passing of the order.

S. T. Srinivasagopalachariar and *K. P. Sarvothama Rao* for Appellant.

K. Srinivasa Rao for Respondent.

B.V.V. ——— *Appeal dismissed.*

Satyanarayana Rao, J. Kandaswami Chettiar *v.* Shanmuga Thevar.
9th July, 1948. S. A. No. 869 of 1946.

Contract—Specific performance—Provision for payment of damages—Party in default—Resistance to suit for specific performance.

Under a contract of sale the price was fixed at a certain figure and a portion thereof was paid as advance on that date, the balance being payable within one month from the date of the contract. It further provided as follows : " In case there is default in completing the sale deed within due date aforesaid the individual who commits the default shall pay the other individual Rs. 100 as damages and in addition this contract shall become void "

Held, that the party who was in default could not say that the contract ceased to be enforceable merely because of his default and that the other party could enforce specific performance.

K. S. Desikan for Appellant.

A. V. Viswanatha Sastri and *T. R. Ramachandran* for Respondents.

B.V.V. ——— *Appeal dismissed.*

Panchapakesa Sastry, J. Madhava Kurup *v.* Muhammad Sukhi Saheb.
12th July, 1948. A. A. A. O. No. 43 of 1946.

Madras Non-residential Building Rent Control Order (as amended), section 8 (1)—*Effect—Suit for ejectment filed earlier—Decree passed subsequently—Execution—Permissibility.*

Where a suit for ejectment was filed before the Amended Non-residential Building Rent Control Order took effect, and the decree for ejectment having been passed subsequently the decree-holder sought to put the decree in execution,

Held, that the words " in execution of a decree or otherwise " in section 8 (1) of the Order applied only to decrees passed in suits instituted after 11th July, 1944, and that as the suit in this case had been filed earlier, the decree-holder was entitled to apply for delivery in execution.

S. V. Venkatasubramaniam for Appellant.

S. R. Subramania Aiyar for Respondent.

B.V.V. ——— *Appeal allowed.*

Rajamannar, C.J. and *Mack, J.* Mrs. Sithamahalakshmi *v.* Masilamani Mudaliar.
19th July, 1948. C. M. P. No. 3086 of 1948.

Madras Buildings (Lease and Rent) Control (XV of 1946), *section* 7 (2)—*Relationship one of mortgagor and mortgagee and not landlord and tenant—Construction of agreement—Order for eviction—Writ of* certiorari.

In June 1946, the petitioner and the 1st respondent entered into an agreement which provided as follows : that petitioner should advance to 1st respondent a certain amount on mortgage by deposit of title deeds of certain property and that the amount was to carry interest at three per cent per annum, and that petitioner should pay a monthly rental for the premises and deduct therefrom a portion towards the monthly interest on the amount advanced. It further provided that the tenancy of the petitioner should not be disturbed on any account except at her option for a period of two years and further without repayment of the amount advanced. The petitioner advanced the amount provided under the agreement and entered into possession and later a memorandum of equitable mortgage was made and registered. The respondent applied to the Rent Controller for eviction and the Chief Judge Court of Small Causes made an order in his favour. The petitioner having applied for a writ of *certiorari,*

Held, that the relationship between the parties was one of mortgagor and mortgagee and not that of landlord and tenant and that the Chief Judge had no jurisdiction to pass the order of eviction.

I.L.R. 2 Mad. 187, referred to.

P. Somasundaram and *G. N. Chari* for Petitioner.

T. R. Sangameswaran for 1st Respondent.

B.V.V. ——— *Writ issued and order quashed.*

Govinda Menon, J. The Public Prosecutor *v.* Ibrahim Sahib.
21st July, 1948. Crl. Appeal No. 45 of 1948.

Arms Act (XI of 1878), *sections* 19 *and* 20—*Person returning from Ceylon to British India—Possession of live cartridges—Attempt to conceal same from customs authorities—Offence if committed.*

The respondent who had a licence for possessing arms in the then Indian State of Pudukottah was found at an Indian port on his returning from Ceylon with certain live cartridges. He tried to hide them but the customs authorities detected the same and prosecuted him for offences under sections 19 and 20 of the Arms Act.

Held, that the bringing of the cartridges by sea from Ceylon to British India was an act within the meaning of section 19 (*c*) and in as much as there was an intention on his part to hide his act from the observation of the customs officers he was liable to be convicted under section 20 of the Arms Act.

The Public Prosecutor (*V. L. Ethiraj*) appellant in person.

V. T. Rangaswami Aiyangar and *R. Santhanam* for Respondent.

B.V.V. ——— *Appeal dismissed.*

The Chief Justice and Satyanarayana Rao, J.
23rd April, 1948.

Radhakrishnan and another *v.* Satyanarayana and others.
S. A. No. 1566 of 1945.

Hindu Law—Partition—Division in status—Filing of plaint—Summonses served—Effect—Revocation of intention—Permissibility.

The plaintiff sued for a declaration that the sales in respect of certain family properties did not bind him and for partition and possession thereof. The plaint referred to an earlier suit instituted by the present 2nd defendant for partition of the joint family property. The plaint in that suit contained the following averment : " The plaintiff being unwilling to remain joint with the defendants has decided to become divided and he has filed this suit for separation of his share after discharging the family debts separated and for recovery of possession of the same." The suit summonses were served on all the defendants therein. After the issues were settled the 1st defendant in the earlier suit died and the plaintiff therein thereupon made the following endorsement on the plaint : " As the 1st defendant had died and as the plaintiff himself had to manage the family the plaintiff hereby revokes the intention to divide expressed in the plaint and agreeing to remain as a joint family member, he withdraws the suit."

Held, that the material intention to separate contained in the plaint and communicated to the other members brought about a division in status and that it was not open to the plaintiff in the previous case to withdraw his intention to separate, and that in the absence of a re-union the rights of the parties should be worked out as among divided members.

M. S. Ramachandra Rao for Appellants.

D. Narasaraju, G. Chandrasekhara Sastri and *K. B. Krishnamurthi* for Respondents.

B.V.V. ——— *Appeal allowed in part.*

Govinda Menon, J.
6th July, 1948.

Kandaswami Goundan, *In re.*
Govind Goundan and others.
Cr. R. C. Nos. 1267 and 1307 of 1947.
(Cr. R. P. No. 1152 and 1191 of 1947).

Essential Supplies (Temporary Powers) Act (XXIV of 1946), *section* 7—*Sale and transport of paddy without permit—Offence committed before Act took effect—Same punishable under Ordinance then in force—Conviction—Sustainability.*

The accused were prosecuted of an offence under section 7 (1) of the Central Act XXIV of 1946, for selling paddy to a person other than the Collector or his agent and transporting the same without a permit. At the time of the alleged offence namely, 5th February, 1947, the enactment in force was Act XXIV of 1946. The Defence of India Rules expired on 30th September, 1946 and was repealed by Ordinance No. XVIII of 1946. The latter Ordinance again was substituted by Act XXIV of 1946 which came into effect in November, 1946. It appeared that the Collector's order which was alleged to have been contravened was promulgated on 15th June, 1946, under section 81 (2) of the Defence of India Rules then in force.

Held, that the effect of section 3 of the Ordinance XVIII of 1946 was that the sale and transport of paddy without the Collector's permit was an offence thereunder and that the accused were liable to be convicted for the said offence even though the Ordinance had been replaced by the Central Act XXIV of 1946.

50 Bom.L.R. 295, relied on.

P. S. Kailasam and *P. Basi Reddi* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V. ——— *Sentence modified*

Govindarajachari, J. Girjaram Singh *v.* Moopur Samban and others.
16th July, 1948. S. A. No. 1591 of 1945.

Madras Agriculturists' Relief Act (*IV of* 1938)—*Open payment—Appropriation—Overt act necessary—Amount paid being equal to interest—Failure to appropriate.*

There must be an overt act from which appropriation can be reasonably deduced or inferred. The decision in *Raghava* v. *Devarajulu*, I.L.R. 1943 Mad. 563 only held that there was an appropriation in regard to the excess of the payment over the interest then due. It says nothing as to the appropriation of that portion of the payment which is equal to the interest due at that time. Such part of the payment is really an open payment which is liable to be subsequently appropriated in a manner favourable either to the creditor or the debtor. And in the absence of such appropriation it would continue as an open payment.

R. Gopalaswami Aiyangar and *N. T. Raghunathan* for Appellant.

T. L. Venkatarama Ayyar for Respondents.

B.V.V. *Appeal dismissed.*

Satyanarayana Rao, J. Sabapathy Pillai and others *v.* Mohammad Ilais Sait and others.
16th July, 1948. S.A. No. 2371 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 57 (*as amended in Madras*)—*Attachment before judgment—Decree subsequently passed—Interim attachment made absolute—Dismissal of execution petition without notice to decree-holder—Attachment directed to be continued—Private alienation thereafter—Validity.*

The plaintiff who filed a suit on a promissory note executed by the first defendant in his favour applied for and obtained an interim order for attachment before judgment of certain immoveable properties belonging to the said defendant. The suit was subsequently decreed *ex parte* and the interim attachment was made absolute. Later on the decree-holder applied for sale of the properties and the court eventually ordered proclamation and sale. Before the adjourned hearing however the office put up a note stating that it was then discovered that the properties which were sought to be sold were within the jurisdiction of another District Munsiff's Court. The hearing was thereupon advanced without notice being given to the decree-holder and the petition was dismissed but the attachment was directed to continue. The decree-holder thereupon applied for transmission of the decree to the proper court for execution but meanwhile the properties were transferred by the judgment-debtor in favour of a third person. The plaintiff decree-holder contended that notwithstanding the dismissal of his petition the original attachment before judgment subsisted and that the alienation contrary thereto was invalid.

Held, that the order dismissing the petition without notice to the decree-holder was a nullity.

Held further, that the attachment made before judgment subsisted after the passing of the decree and that the Court could only dismiss the execution petition on the ground that it had no jurisdiction to entertain the same and that the attachment did not cease to have effect and that consequently the third party's purchase was invalid.

P. S. Ramachandran for Appellants.

A. C. Sampath Aiyangar for Respondents.

B.V.V. *Appeal allowed.*

Rajagopalan, J.
16th July, 1948.

Lakshmidevamma *v.* Nagayya and others.
C. R. P. No. 117 of 1947.

Civil Procedure Code (V of 1908), *section* 115 *and Order* 1, *rule* 10—*Addition of party by Court—Proper party—Interference in revision.*

The plaintiff who claimed that on the death of her husband she succeeded to his properties sued defendants 1 to 3 the other members of the family for a declaration of her right and for a permanent injunction restraining the defendants from interfering with her enjoyment of the properties. The second defendant pleaded *jus tertii* on the ground that his son, who was subsequently impleaded as the fourth defendant, was the adopted son of the plaintiff's husband and that he was in possession of the properties. The fourth defendant was impleaded as party on his own application.

Held, that the fourth defendant was a proper party to the suit and that the order for his joinder was not liable to be set aside in revision at the instance of the plaintiff.

B. V. Ramanarasu for Petitioner.

Konda Kotayya for Respondents.

B.V.V. ——— *Petition dismissed.*

Govinda Menon, J.
20th July, 1948.

Nambi Seshiah, *In re.*
Cr. M. P. No. 1472 of 1948.

Criminal Trial—Defence witness—Issue of bailable warrant—Propriety.

It is not proper for a Magistrate to issue a bailable warrant to a defence witness who has not appeared unless the accused asks for it.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V. ——— *Order for transfer made.*

Govinda Menon, J.
21st July, 1948.

The Public Prosecutor *v.* Ramalingeswaraswamy.
Crl. App. No. 114 of 1948.

War Risks (Goods) Insurance Ordinance, section 7 (2)—*Offence under—Prosecution after section* 7, *was repealed—Validity—Effect of retention of sections* 12 *and* 12-*A.*

The accused was convicted by the trial Court of an offence under Section 7 (2) of the War Risks (Goods) Insurance Ordinance but the conviction was set aside by the Sessions Judge on the ground that at the time the prosecution was launched, section 7 of the Ordinance had been repealed and that therefore there was no jurisdiction for the Courts to entertain the case. The Crown having appealed,

Held, that the repeal of section 7 will not take away the right which the Crown had to institute prosecutions for an offence committed when section 7 was in force, and that the retention of sections 12 and 12-A in the statute indicated that such prosecutions were competent.

The Public Prosecutor (*V.L. Ethiraj*) for Appellant.

G. Chandrasekhara Sastry for the Accused.

B.V.V. ——— *Appeal allowed.*

Rajagopalan, J.
23rd July, 1948.

Janakumara Nainar *v.* Periasamy.
Goundan and others.
A. A. O. No. 320 of 1946.

Execution—Order for filing of sale papers—Extension of time—Dismissal of application on last date to which time was extended—Validity.

The appellant filed the Execution Petition in the lower Court on 24th September, 1945 and he was directed to furnish the sale papers. Time was extended periodically and on 31st October, 1945 he applied for further time. The order of the court was " Time extended finally 2nd November, 1945." The sale papers not having been filed on 2nd November, 1945 the court dismissed the execution petition on that day.

Held that the effect of the order was that time was granted till 2nd November 1945 and that the order of dismissal passed on the latter date was without jurisdiction.

D. Ramaswami Aiyangar for Appellant.

A. Narasimhachariar for Respondents.

B.V.V. *Appeal allowed.*

Rajagopalan J. Nookaratnam *v.* Suryanarayana.
23rd July, 1948. A.A.A.O. No. 308 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 21, *Rule* 32—*Decree for restitution of conjugal rights—Meaning of word "wilful"—Discretion of Court to order attachment.*

The use of the expression " may " in Order 21, rule 32, Civil Procedure Code, vests the executing Court with a discretion which is to be exercised in a judicial manner. The word ' wilfully ' in the section does not mean ' unreasonably.' In the case of a decree for restitution of conjugal rights the refusal of the judgment-debtor to live with her husband expressed in unequivocal terms is ' wilful ' within the meaning of the Rule.

M.S. Varadacharya for Appellant.

K. Bhimasankaram for Respondent.

B.V.V. *Appeal allowed.*

Govindarajachari, J. Kamanna and others, *In re.*
23rd July, 1948. S.R. No. 1660 of 1948.

Court-Fees Act (*VII of* 1870) (*as amended in Madras*), *Article* 17-*B—Applicability —Suit framed as one against guardian and trustee for accounts and claiming specified amount with* ad valorem *court-fee paid thereon—Decree for possession and for the amount claimed as profits—Appeal against—Court-fee.*

The plaintiff sued for recovery of certain properties who prayed that the defendants who were described as guardians and trustees should render an account of the rents of the properties. The plaintiff however treated the suit as a claim for recovery of a specified amount and paid *ad valorem* court-fee thereon. The trial court decreed the suit with reference to the relief of possession and with reference to the amount claimed, it allowed the same as profits and interest, the exact amount however being left to be determined later. The defendants having preferred an appeal, the question of court-fee payable was raised on a reference under Section 5 of the Court-Fees Act.

Held, that it was not possible for the defendants to estimate the value of the relief granted by the decree as against them and that they could pay a court-fee of Rs. 100 on the memorandum of appeal, the same being leviable to court-fees under Article 17-B of the Court-Fees Act as amended in Madras.

C. Rama Rao for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

B.V.V. *Order for payment of additional court-fee made.*

Rajamannar, C.J. and Mack, J.
6th July, 1948.

Sri Venkateswara & Co. *v.* Alwar Chetty and others.
O.S.A. No. 85 of 1947.

Presidency Towns Insolvency Act (III of 1909), *section* 9, *clause* (g)—*Letter by debtor to creditor intimating inability to pay—When amounts to notice of suspension of payment.*

The question whether a letter by a debtor to his creditor would amount to a notice of suspension of payment of debts within section 9, clause (*g*) of the Presidency Towns Insolvency Act is more one of fact than law, the question being on the evidence what is the impression left upon the creditor by the letter. While a bare declaration of inability to pay debts does not amount to an act of insolvency it may well be accompanied by such circumstances and might have been in such context that if the impression produced upon the minds of the creditors receiving it is such as to amount to a statement that the debtor is going to suspend the payment of his debts it might amount to an act of insolvency.

Where the business of the debtor firm had stopped and several creditors who were pressing for payment of dues had been satisfied with accepting less than what was due to them in money or goods or in both, though there is no explicit statement in the letter that the partners, were giving notice that they had suspended payment of debts, the debtor's letter could be held to constitute notice of suspension of payment. It is rarely that one comes across a definite statement in the terms of the language of the section and it is more often than not a matter of inference.

K. Subramanyam for Appellant.

C. Srinivasachari, T. V. Srinivasan and *The Official Assignee of Madras* for Respondents.

K.S. *Appeal allowed.*

Govindarajachari, J.
21st July, 1948.

Venkatapathi *v.* Nagiah.
C. R. P. No. 1068 of 1946.

Provincial Insolvency Act (V of 1920)—*Official Receiver framing schedule of creditors—Power to scale down debt under Madras Act IV of* 1938—*Annulment of adjudication and vesting of insolvents' property in a Special Receiver under section* 37 *of the Provincial Insolvency Act—Creditor whose debt had been scaled down after due notice to him by the Official Receiver—If can claim before Special Receiver that his debt was not liable to scaling down.*

In framing the schedule of creditors the Official Receiver is acting under a delegated authority under the provisions of the Provincial Insolvency Act. A scaling down of a debt by the Official Receiver is valid and must be upheld. Accordingly when there is an annulment of adjudication and vesting of property in a special Receiver under section 37 of the Provincial Insolvency Act a creditor whose debt has been scaled down by the Official Receiver cannot contend before the Special Receiver that the debt due to him was not liable to be scaled down under Madras Act IV of 1938. In the absence of any provision in Madras Act IV of 1938, designating the Courts which are empowered to scale down debts due from insolvents, it is to be governed by the Provincial Insolvency Act and as the Official Receiver is legally empowered to frame a schedule it follows that for determining the amount due to a particular creditor he has jurisdiction to scale down the debt under Madras Act IV of 1938.

M. S. Ramachandra Rao for Petitioner.

B. V. Ramanarasu for Respondent.

K.S. *Petition allowed.*

N R C

Govindarajachari, J. Govinda Nair *v.* Srinivasan Pillai.
22nd July, 1948. A. A. A. O. No. 319 of 1946.

Madras Agriculturists' Relief Act (IV of 1938), *section* 3 (5)—" *Creditor* " *includes his assigns—Allotment of mortgage debt due to joint family to one member by registered partition deed—Sufficient legal assignment for purposes of definition of* " *creditor* " *to make him "same creditor."*

If there was a writing at the time of the partition of a joint Hindu family evidencing the allotment of a promissory note debt to a person, that would be a legal assignment giving him the position of a creditor under the note and as he was the assignee of the former creditor, the definition of " creditor " in Madras Act IV of 1938, would make him the " same creditor." In the case of a mortgage debt if there is a registered deed of partition there will be a legal assignment so as to make the creditor the " same creditor " for purposes of Madras Act IV of 1938.

Decision in C. R. P. No. 348 of 1939 and C. R. P. No. 971 of 1942, applied.

Quære.—Whether and to what extent a partition can be regarded as an assignment for the purpose of other statutes or where questions other than those which arise under Madras Act IV of 1938, fall to be considered.

V. Balakrishna Eradi for Appellant.

C. S. Swaminathan for Respondent.

K.S. *Appeal allowed. Leave to appeal refused.*

Panchapagesa Sastry, J. Venkataratnam *v.* Appalaraju.
22nd July, 1948. S. A. No. 225 of 1946.

Malicious prosecution—Suit for damages for—Gist of and onus of proof.

In an action for damages for malicious prosecution the onus is on the plaintiff to prove want of reasonable and probable cause and also malice. It is not sufficient for the plaintiff merely to prove that he was prosecuted and that the prosecution terminated in his favour. He must go further and prove the circumstances under which the prosecution was instituted. If his evidence *prima facie* leads to the conclusion that there has been want of reasonable enquiry on the part of the defendant before he instituted the prosecution and if there is no evidence on the side of the defendant at all, the plaintiff would have discharged the burden that lies on him. If, however, the defendant also gives evidence or facts which he desires to prove, then the entire evidence has to be considered and upon that a conclusion must be come to, whether there was absence of reasonable and probable cause for the prosecution. If on a consideration of the evidence on both sides, it is in doubt whether there was reasonable enquiry on the part of the defendant as to the truth of the case, then it must be taken that the plaintiff has failed to discharge the burden that is upon him of establishing absence of reasonable and probable cause.

K. Mangachari for Appellant.

K. Bhimasankaran for Respondent.

K.S. *Appeal dismissed. Leave to appeal refused.*

Satyanarayana Rao, J. Viswanatham *v.* Balarami Reddi.
22nd July, 1948. S. A. Nos. 2029 of 1945, etc.

Limitation Act (IX of 1908), *Art.* 115—*Claim for damages for use and occupation against tenant at sufferance—Limitation.*

The essence of an action for damages for use and occupation against a person who continues in possession as a tenant at sufferance is one based upon an implied contract and not either on tort or on a statutary obligation and the Article of the Limitation Act applicable to such an action is Article 115 and not Article 120.

Ch. Raghava Rao for Appellant.

T. Venkatadri for Respondent.

K.S. *Appeals dismissed. Leave to appeal refused.*

Satyanarayana Rao, J. Ramaharshanam *v.* Subba Rao.
22nd July, 1948. S. A. No. 2058 of 1945.

Registration Act (*XVI of* 1908), *sections* 32 *and* 35—*Presentation for registration by vendee—Step-mother of children of deceased vendor admitting execution—Sufficiency.*

Where a vendor was dead there is no defect if the vendee under the document presents it for registration. Under section 32 of the Registration Act a person claiming under a document can present it for registration. Under section 35 when a document is presented for registration execution must be admitted and if the executant is dead, either by the representative or the assignee of the deceased executant. Where the step-mother of the executants' minor sons accepted execution as representative of the deceased the requirements of law are satisfied and the registration of the document must be held to be valid although it is found that the step-mother was not the guardian of the minors who were living with their natural grandmother. The admission of execution by a person closely related to the minor and one whom the Court would consider as eligible for appointment as lawful guardian can satisfy the requirements of section 35 of the Registration Act.

(1944) 2 M.L.J. 126, relied on.

N. Narasimham, N. Ramakrishnayya and *N. Seetharamayya* for Appellant.

B. Manavala Chowdhury and *M. S. Ramachandra Rao* for Respondent.

K.S. *Appeal dismissed. Leave to appeal refused.*

Govindarajachari, J. Addala Swami *v.* Gouth Muttarao.
27th July, 1948. A. A. A. O. No. 241 of 1946.

Res Judicata—*Execution proceedings—Applicability of principles of* res judicata.

Where an executing Court directs execution to proceed after notice to judgment-debtor any objection which could have been taken on the ground of limitation or as regards the executability of the decree or the like must be held to have been decided adversely to the judgment-debtor on the principle of constructive *res judicata.* Where a particular objection is referred to and overruled it operates as *res judicata.* Whether the reason given for so overruling is right or not has no bearing on the question whether the order operates by way of *res judicata.*

V. Parthasarathi for Appellant.

C. Rama Rao for Respondent.

K.S. *Appeal dismissed. Leave to appeal refused.*

Govinda Menon, J. Sha Phudajee Naganlal.
29th July, 1948. Crl. App. No. 95 of 1948.

Madras Paper Control (*Licensing Economy and Distribution*) *Order* (*II of* 1945), *clauses* 3 *and* 7 *as continued in Act XIV of* 1946—*Selling strawboards without obtaining license—Offence—*"*Strawboard*"*—If paper.*

It cannot be accepted that strawboard does not come within the meaning of the term "Paper" within in the meaning of Madras Paper Control (Licensing Economy and Distribution) Order (XIV of 1946). However as the accused acted under a *bona fide* belief that no license was necessary for selling paper as the Central Government had removed the control, the confiscation of the paper obtained from mills and sold without obtaining a license will be a real hardship and the order of confiscation was set aside.

V. Rajagopalachari and *P. S. Kothandapani* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

K.S. *Order varied.*

Rajamannar, C.J. and Yahya Ali, J.
2nd August, 1948.

Chelliah Pillai *v.* The Commissioner of Income-tax, Madras.
C. M. P. No. 811 of 1948.

Income-tax Act (XI of 1922)—*Income—Amount received by assessee from sale of trees of spontaneous growth standing on channel poramboke—If " income " liable to tax.*

Amounts received by an assessee by the sale of trees on channel poramboke are " income " liable as such to income-tax. The receipts cannot be said to be casual because in the ordinary course of nature one cannot expect trees to grow again particularly when such trees were of spontaneous growth. The receipt cannot be said to be non-recurring though it might not recur at certain intervals. It can be perceived that there can be an expectation of similar income from trees which might naturally be expected to grow in the place of those which have been cut and sold. The fact that the return may be at long intervals would not take away the proceeds from the category of " income."

(1930) 59 M.L.J. 265 : I.L.R. 54 Mad. 21, relied on.

T. R. Sangameswaran for Petitioner.

C. S. Ramarao Saheb for Respondent.

K.S. *Petition dismissed.*

Rajamannar, C.J. and Yahya Ali, J.
2nd August, 1948.

Shanmuga Vel Nadar & Sons *v.* The Commissioner of Income-tax, Madras.
Case Referred No. 17 of 1946.

Excess Profits Tax Act (1940), *section* 8 (1)—*Business previously carried on and owned in partnership by Hindu undivided family and a stranger —Disruption of family and carrying on of business by partnership composed of members of the family and same stranger—If " change " in the persons carrying on the business.*

There is a change in the persons carrying on a business within the meaning of section 8 (1) of the Excess Profits Tax Act, 1940, when the business which was previously carried on and owned by the Hindu undivided family and a stranger is on disruption of the family being carried on and owned by a partnership composed of the members of the quandom family and the stranger.

(1944) 1 M.L.J. 112 : I.L.R. 1944 Mad. 504 (F.B.), applied.

It cannot be said that when the family was carrying on business in partnership with the stranger all the members of the family were also persons carrying on the business and that there was no change in the persons carrying on the business.

(1934) 67 M.L.J. 366 (P.C.), relied on.

N. T. Raghunathan and *N. T. Ramanujam* for the Applicant.

C. S. Rama Rao Saheb for the Respondent.

K.S. *Reference answered.*

Panchapagesa Sastri, J.
4th August, 1948.

Venkatarangacharyulu *v.* Vankanna.
S. A. No. 2349 of 1945.

Madras Estates Land Act (I of 1908), *section* 3, *Explanation* (1)—*Village granted to agraharamdars—Existence of minor inams—Effect—Waste lands not included in grant not set apart for communal purposes—Effect.*

Where minor inams are shown to exist in a village the grant of the remaining property cannot be taken to be of a whole village and such a grant would not satisfy the definition of the term " Estate " in the Madras Estates Land Act. In the absence of proof that the waste lands not included in the grant to the agraharamdars had been set apart for communal purposes, Explanation (1) to the definition of the term " Estate " in the Madras Estates Land Act does not apply and a Civil Court has jurisdiction to grant a decree for ejectment.

(1945) 1 M.L.J. 300, relied on.

V. Rangachari and *C. V. Narasimha Rao* for Appellant.

M. Appa Rao for Respondent.

K.S. *Appeal allowed. Leave to appeal granted.*

Mack, J. Venkatacharyulu & others *v.* Shri Venugopalaswami
30th July, 1948. Varu represented by trustees.
C.R.P. No. 762 of 1947.

Civil Procedure Code (V of 1908), *Order* 33, *rule* (5)—*Objection to pecuniary jurisdiction —If should be decided before leave to sue* in forma pauperis *is granted.*

An objection as to the pecuniary jurisdiction of the Court need not be determined before permission to sue *in forma pauperis* is granted. It does not come within the scope of Order 33, rule (5), Civil Procedure Code as one of the grounds on which an application for permission to sue *in forma pauperis* may be rejected.

B. V. Subrahmanyam for Petitioners.

D. Narasaraju and *K. B. Krishnamurthi* for Respondent.

V.S. ——— *Petition dismissed.*

Govindarajachari and Mack, JJ. Amirthalingam Pillai, *In re.*
4th August, 1948. U. S. R. No. 5999 of 1948.

Criminal Trial—Practice—Judgment of High Court in a Referred trial confirming conviction and sentence for murder passed by District and Sessions Court—Leave to appeal to His Majesty in Council—High Court has no jurisdiction to grant.

In an application for leave to appeal to His Majesty in Council against the judgment of the High Court in a Referred trial confirming the conviction for murder and sentence of death passed on the petitioner in the District and Sessions Court,

Held, there is no statutory provision conferring on the High Court jurisdiction to grant such leave. There is no inherent power in the High Court to grant leave to appeal to His Majesty in Council and section 223 of the Government of India Act, 1935, which preserved the jurisdiction of the High Court to the extent it existed before is of no avail as there was no inherent power or jurisdiction in the High Court. Rule 2 of the Judicial Committee Rules does not give any right of appeal and the rules deal only with the procedure which is to be followed in regard to the several appeals which may be taken to the judicial committee. Even assuming that the Supreme Court at Madras had the same powers as the Court of King's Bench in London and that the High Court has inherited the jurisdiction of the Supreme Court it cannot be said that the King's Bench had any inherent power to grant leave to appeal to a higher tribunal. There is no jurisdiction under clause 41 of the Letters Patent of the High Court to grant leave to appeal to His Majesty in Council against judgments of Presidency High Courts in Criminal Appeals against judgments of the Courts of session in the mofussil.

I.L.R. 58 Cal. 414, referred to.

Besides it was enacted in 1943 that "clause 41 of the Letters Patent shall cease to have effect." (*See* section 7 (1) of Act XXVI of 1943).

Certificate under section 205 of the Government of India Act, 1935, refused.

D. A. Shanmughasundaraswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Govinda Menon, J. R. Srinivasan and others *v.* The Andhra Bank, Ltd.
6th August, 1948. C.R.P. No. 797 of 1948.

Civil Procedure Code (V of 1908), *Order* 21 *rule,* 66 (2) (*e*) *and* (*f*)—*Sale proclamation —Market value—Court, if bound to fix its own valuation and insert such value in the proclamation.*

The Court is under no obligation to embark upon an enquiry regarding the value of the property to be sold and to insert such value in the proclamation of sale. Clause (*f*) of Order 21, rule 66 (2), Civil Procedure Code cannot be construed as including within its ambit any statement about the Court's view about the market value. By enacting the new clause (*e*) in rule 66 (2) of Order 21, Civil Procedure Code, it should be deemed that the residuary clause (*f*) is intended to cover matters other than the market value.

S. Ramachandra Aiyar for Petitioners.

P. Somasundaram for Respondent.

V.S. ——— *Petition dismissed.*

N R C

Govinda Menon, J.
10th August, 1948.

Nalliappa Pillai *v.* Palaniandi Ambalam.
Crl.R.C. No. 584 of 1947.
(Crl.R.P. No. 480 of 1947).

Criminal Procedure Code (*V of* 1898), *section* 203—*Scope—Complaint referred to police for enquiry—Rejection under section* 203 *after considering police report—Opportunity to complainant to show that the report was wrong—Necessity.*

Nowhere is it stated that a Magistrate who has referred a complaint for enquiry should, after receipt of the police report, give an opportunity to the complainant to adduce evidence to show that the report of the police is wrong or incorrect. Section 203, Criminal Procedure Code does not impose a duty upon the Magistrate before whom the complaint is made or to whom it has been transferred to give an opportunity to the complainant to show that the report of the police enquiry is wrong. All that the Magistrate has to do is to consider the statement on oath if any, of the complainant as well as the result of the investigation or enquiry under section 202, Criminal Procedure Code before he dismisses the complaint.

A. V. Narayanaswami Aiyar for the Petitioner.

K. Veeraswami and *N. Kasiviswanathan* for the Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

V.S. ——— *Petition allowed.*

Rajamannar, C.J. and Yahya Ali, J.
10th August, 1948.

W.L. Knopp *v.* Commissioner of Income-tax, Madras.
Case Refd. No. 20 of 1946.

Income-tax Act (*XI of* 1922)—*Carrying on a trade—Purchase and sale of shares.*

Where an assessee, a partner in a firm of stock-brokers, sold during the year of accounting shares in various companies on 12 occasions and as a result of these sales he made a substantial profits, on a question whether the ventures in question were ventures in the nature of trade,

Held: In the circumstances it could not be said that the assessee was not carrying on a trade. It was not a case in which the assessee purchased a large number of shares for investment and gradually or at a time disposed of such of the shares which he did not wish to retain. There were enough materials to hold that the assessee must have been purchasing these shares with a view to resale and the purchases and sales were transactions in the course of carrying on business.

O. T. G. Nambiar instructed by *Messrs. King and Patridge*, Attorneys-at-law for the Applicant.

C. S. Ramarao Saheb, for the Respondent.

V.S. ——— *Reference answered.*

Govindarajachari and Mack, JJ.
12th August, 1948.

Periyasami Asari, *In re.*
Crl. App. No. 402 of 1948.

Madras Borstal Schools Act (*V of* 1926), *section* 10-*A—Recommendation for special treatment—Justifying circumstances.*

Where in a case in which the accused was convicted of the murder of his mother, though there had been no sudden provocation but long and sustained provocation which resulted in a complete break down of control and the accused had been the victim of an abnormal and unnatural environment bereft of maternal affection,

Held, that it was not a fit case in which he should serve a long term of life imprisonment in an ordinary jail. The mitigating circumstances were sufficiently cogent to justify a recommendation to Government to give the accused special treatment under section 10-A of the Madras Borstal Schools Act, and in exercise of their prerogative under section 401, Criminal Procedure Code to remit a portion of his ordinary punishment.

V.S. ——— *Appeal dismissed. Recommendation made to Government for treatment under section 10-A, Madras Borstal Schools Act.*

Mack, J. Venkatarama Aiyar *v.* Unnamulai Ammal.
30th July, 1948. A. A. O. No. 508 of 1946

Civil Procedure Code (*V of* 1908), *Order* 41, *rule* 23—*Party who did not signify his intention of appealing against remand order by applying for stay—Appeal against remand order—If maintainable after the decision at rehearing on remand.*

In the case of a remand it may often be that the first appellate Court formulates an entirely fresh footing on which the parties should proceed to a fresh trial and if the parties do so without in any way signifying or indicating their non-acceptance of this new basis for a fresh hearing, by adopting the simple method of applying for stay of further proceedings under the remand order they must be deemed to have accepted the new basis and submitted to a fresh trial on the new footing. After a decision in the rehearing an appeal against the order of remand is not sustainable and the remedy will be only by way of appeal against the decision at the rehearing on remand. The wide privileges of appeal conferred by the Legislature should be exercised within the confines of reason and practicability. Observations in 37 Mad. 29 treated as *obiter* and distinguished.

Authorities discussed.

V. T. Rangaswami Aiyangar for Appellant.

A. Seshachariar for Respondent.

K.S. *Appeal dismissed. Leave to appeal granted.*

Horwill, J. Paramasivam Pannaiyar *v.* Kumaraswamy Pannaiyar.
3rd August, 1948. S. A. No. 2279 of 1946.

Sale of land—Vendee keeping consideration to pay debts of vendor but not paying the debts—Vendor paying—Remedy of—Indemnity or damage—Contract Act (*IX of* 1872), *section* 69—*If applicable.*

Where a sale was free of encumbrance and the vendee contracted as consideration for the property to pay two debts of the vendor, a failure to pay the debts could give the vendor the ordinary remedies which are open to a party upon a breach of contract. But in such a case there is no express or implied covenant to indemnify the vendor against any loss that might be incurred by him because of the breach of the covenant.

Case-law discussed.

The vendor discharging the debts cannot claim a right to reimbursement under section 69 of the Contract Act.

D. Ramaswami Aiyangar for *C. S. Rajappa* for Appellant.

A. Swaminatha Aiyar for Respondent.

K.S. *Appeal allowed.*

Satyanarayana Rao, J. The Official Receiver, Ramnad *v.* Devarayan Chettiar.
4th August, 1948. A. A. O. No. 207 of 1946.

Provincial Insolvency Act (*V of* 1920), *section* 28-A (*introduced by Act XXV of* 1948)—*Scope and effect—Insolvency of Hindu father—Power of disposition over sons' shares—Vesting.*

Section 28-A of the Provincial Insolvency Act introduced by the amending Act, XXV of 1948, is retrospective and the effect of the amended provision is that in the right of the father and manager of the joint family (on the adjudication of the father in 1936 as insolvent) the Official Receiver was entitled to take possession of the entire property and also collect rents and profits for applying them for the discharge of the debts of the father which were not tainted by illegality or immorality. The father and therefore the receiver could not exercise the power of disposition over the sons' share after a suit for partition had been instituted.

(1942) 2 M.L.J. 457 : I.L.R. (1943) Mad. 83 (F.B.) not followed.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Appellant.

M. Murugappa Chettiar for Respondent.

K.S. *Appeal partly allowed.*

Satyanarayana Rao, J.
6th August, 1948.

Karamadai Naicken *v.* Raju Pillai.
S. A. No. 78 of 1946.

Limitation Act (IX of 1908), *section* 19—*Statement that there was a liability but that it had been discharged—If and how far an acknowledgment.*

A statement by a debtor that there was a liability but that it was discharged does not amount to an acknowledgment. Such a statement must be taken as a whole and the intention of the person making it must be gathered by reading the document as a whole and not by confining attention to a particular portion of it ignoring the rest of it.

Case-law discussed.

V. T. Rangaswami Aiyangar for Appellant.

G. R. Jagadisa Aiyar and *J. R. Alwar Naidu* for Respondents.

K.S. ——— *Appeal allowed. Leave to appeal refused.*

Govinda Menon, J.
6th August, 1948.

Ponnambalam Pillai *v.* Panjaksharam Pillai.
C.R.P. No. 792 of 1947.

Civil Procedure Code (V of 1908), *Order* 33, *rule* 1, *Explanation* 1 (b)—*Scope—Suit to set aside compromise decree—Property admitted by compromise decree to belong to the plaintiff—If can be taken into account.*

Where a pauper sues for setting aside a compromise decree claiming more than what is admitted to belong to him according to the compromise decree, it cannot be said that for purposes of a pauper application the subject-matter of the proposed suit is not the entire compromise decree. What the plaintiff seeks to set aside is the entire decree and the same cannot be cut up into various divisible parts.

S. Ramachandra Aiyar for Petitioner.

K. Srinivasan for Respondent.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Yahya Ali, J.
9th August, 1948.

The Commissioner of Income-tax, Madras *v.* Arokiaswami Chetty & Co.
Case Referred. No. 67 of 1946.

Income-tax Act (XI of 1922), *section* 26-A—*Existence of operative instrument of partnership—If essential for renewal of registration—Partnership Act (IX of* 1932), *section* 17—*Effect.*

For the renewal of registration of a firm under section 26-A of the Income-tax Act the existence of an instrument of partnership operative at the time of the application or relating to the accounting period is essential. Section 26-A does not refer in terms to renewal of registration. Every renewal of registration is in effect a registration under that section. A firm constituted for three years must be deemed to have come to an end on the expiry of three years specified in the deed and after that the firm cannot be registered under section 26-A though the partners and their shares remained unaltered. There is nothing in section 17 of the Partnership Act to justify a conclusion that there is no necessity for an operative deed of partnership to entitle a firm to obtain renewal of registration.

C. S. Rama Rao Sahib for Applicant.

T. M. Krishnaswami Aiyar and *K. Subramaniam* for Respondent.

K.S. ——— *Reference answered.*

Satyanarayana Rao, J.
10th August, 1948.

Satyanarayanamurty *v.* The Official Receiver, West Godavari.
S. A. No. 2319 of 1945.

Transfer of Property Act (IV of 1882), *section* 82—*Scope—"Contract to the contrary"—Interpretation—If includes contract* inter se *between mortgagors.*

The expression "contract to the contrary" occurring in section 82 of the Transfer of Property Act means a contract between the mortgagee on the one hand and the mortgagor or mortgagors on the other and not a contract *inter se* between the mortgagors or their representatives in interest.

I.L.R. (1943) Mad. 531, (F.B.) followed.

V. Suryanarayana for Appellant.

P. Satyanarayana Raju, Ch. Raghava Rao, V. Viyyanna, P. Somasundaram, P. Suryanarayana and *G. Chandrasekhara Sastri* for Respondent.

K.S. *Appeal allowed. Leave to appeal refused.*

Satyanarayana Rao, J. Varada Pillai *v.* The Corporation of Madras.
11th August, 1948. C. C. C. A. No. 23 of 1947.

Madras City Municipal Act (IV of 1919), *section* 397—*Statutory notice under—Requirements—Notice of suit against Corporation mentioning instead of section* 397, *section* 80, *Civil Procedure Code—If vitiated—Suit based on such notice—Maintainability.*

As to a notice of suit against the Municipal Corporation all that the law requires is that there should be a clear intimation of the nature of the dispute and the nature of the claim. A reference to section 80, Civil Procedure Code or section 397 of the Madras City Municipal Act, is of no consequence and it does not in any manner or to any extent, vitiate the notice from being a statutory notice fulfilling the requirements of section 397 of the City Municipal Act.

R. Deenadayalu for Appellant.

John and *Row* for Respondent.

K.S. *Appeal allowed.*

Rajamannar, C. J. and Yahya Ali, J. Govindarajulu Iyer *v.* Commissioner
11th August, 1948. of Income-tax, Madras.
Case Referred. No. 15 of 1947.

Income-tax Act (XI of 1922), *sections* 22 (1), 28 (1) (*a*) *and* 34—*Failure to furnish return after general notice under section* 22 (1)—*Levy of penalty under section* 28 (1) (*a*) *in course of proceedings under section* 34—*Legality.*

On an assessee's failure without reasonable cause to furnish a return of his total income as required by a notice under section 22 (1) of the Income-tax Act, the Income-tax Officer is legally right in levying a penalty under section 28 (1) (*a*) in the course of proceedings taken by him under section 34 read with section 22 (2) to assess such incomes; which had not previously been assessed at all. So long as the proceedings under section 34 relate to the assessment for the same period as the original assessment, the Income-tax Officer will be competent to levy a penalty on any ground open to him under section 28 (1), even though i relates to the prior proceedings. There is nothing in the language of section 28 which prevents an Income-tax Officer, if he is satisfied in the course of a proceeding under section 34, that a default has occured under section 22 (1), from levying a penalty.

K. Srinivasan for Applicant.

C. S. Rama Rao Sahib for Respondent.

K.S. *Reference answered.*

Rajamannar, C.J. and Yahya Ali, J. Madappa *v.* The Commissioner of
12th August, 1948. Income-tax, Madras.
Case Referred No. 23 of 1947.

Income-tax Act (XI of 1922)—*Assessee failing to prove source and nature of cash receipts—Inference that it is income—Permissibility—Failure of Income-tax officer to notice similar items in previous years—If shifts onus of proving that it is income on Income-tax authorities.*

There cannot be the slightest conceivable doubt that when both the source and the nature of the cash receipts shown in the accounting year have not been proved by the assessee, the Income-tax officer cannot draw any other inference except that such amounts are income receipts and not capital receipts. Merely because the Income-tax Officer has failed to notice similar unexplained cash receipts in the accounts of earlier years in the course of assessment proceedings of those years it cannot be said that the burden is upon the Income-tax officer to prove that such receipts are of an income nature.

K. Krishnaswami Ayyangar and *N. C. Raghavachari* for petitioner.

C. S. Rama Rao Sahib for Respondent.

K. S. ——— *Reference answered.*

Rajamannar, C.J. and Yahya Ali, J.
12th August, 1948.

Goodser & Co. *v.* Commissioner of Excess Profits Tax, Madras.
Case Referred. No. 24 of 1947.

Income-tax Act (XI of 1922), *section* 10 (4) (b)*—Scope—Commission paid by assessee firm to partners—If deductable as expense incurred for earning profits.*

The assessee was a firm composed of *L*, *B* and *G*. *L* and *B* were also the respective proprietors of commission agency businesses known as L & Co. and B. & Co. respectively. Certain sums were paid by way of commission by the assessee firm to L. & Co. and B. & Co. who were canvassing and selling other goods also. The assessee firm claimed deduction of the said sums paid as commission as expenses incurred for earning profits.

Held: Looking at section 10 (4) (*b*) of the Income-tax Act it is clear that there is no distinction made between payments by way of interest, commission, salary or remuneration made to a partner as a partner and payments made to him in a different character. Accordingly such payments cannot be deducted in computing the taxable profits of the assessee firm.

M. Subbaraya Aiyar fhr Applicant.

C.S. Rama Rao Saheb for Respondent.

K.S. ——— *Reference answered.*

Mack, J.
13th August, 1948.

Bavani Sankaram *v.* Mangamma.
C. R. P. No. 671 of 1947.

Jurisdiction—Suit valuation—Suit for partition by an alienee of a portion of property of a coparcener in a Hindu joint family.

For purposes of jurisdiction in a Hindu joint family partition suit it is the plaintiff's interest in the property that must be valued.

1947 (1) M.L.J. 112 relied on.

A suit for partition by the donee or purchaser of a portion of the property of a coparcener is essentially in the first instance for a partition of the share of the coparcener out of which the plaintiff seeks an equitable relief for the recovery of the lands gifted or alienated to him. In such a case, for purposes of jurisdiction the suit must be valued at the value of the share of the alienor coparcener in the entire joint properties and not merely at the value of the property actually claimed by the plaintiff.

A.I.R. 1945 Bom. 336 relied on.

V. Parthasarathi for Petitioner.

Ch. Raghava Rao, K. S. Champakesa Ayyangar and *N. Jaganmohan Rao* for Respondent.

K.S. ——— *Petition allowed.*

Panchapakesa Sastri, J. Veeraraghavamma *v.* Seetharamamurthy Raju.
5th August, 1948. S.A. Nos. 1168 and 1169 of 1945.

Madras Estates Land Act (I of 1908), *section* 42—*Agreement for enhanced rent owing to increase in area of holding—Legality—Application to Collector under section* 42 (2)—*When essential.*

There is nothing in the Estates Land Act to preclude an agreement between landlord and the ryot wherein both admit that there has been an increase in the area of the holding and that the ryot is liable to pay enhanced rent consequently and wherein both of them further agree without any dispute as to what that increased rent should be. Such an agreement is legal. It is only where there is no agreement as regards the additional rent claimed by the landlord on the one hand and not accepted by the ryot on the other that it is necessary to apply to the Collector under section 42 clause (2).

E. Venkatesam for Appellants.

K. Venkatarama Raju for Respondent.

K.S. ——— *Appeals dismissed. Leave to appeal granted.*

Rajamannar, C.J. and Yahya Ali, J. Commissioner of Income-tax and Excess
12th August, 1948. Profits-tax, Madras *v.* Chari & Ram.
Case Refd. No. 33 of 1947.

Income-tax Act (XI of 1922)—*Valuation of stock in trade of assessee dealing in numerous items for computing profits—Proper method.*

Stock in trade in hand is an essential item in the computation of the profit for a period. The accepted basis of valuation of stock is cost or market value, whichever is lower, at the date to which the accounts for a period are made up. Supposing the market value at the closing date is higher than the cost, the Income-tax authorities cannot compel the assessee to value the stock on the basis of the market rate on the ground that the assessee had made a profit. There is no reason why there should be a different principle when there are several articles. The assessee cannot be compelled to adopt either the average cost for all the items or the market rate for all the items The assessee is entitled to compute the income, profits and gains in accordance with the method of accounting regularly employed by him and ordinarily this method must be accepted by the department in the absence of anything to suggest that it is improper and patently false.

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondent.

K.S. ——— *Reference answered.*

Panchapakesa Sastri, J. Chakku *v.* Krishnan Nambudripad.
12th August, 1948. A. A. A. O. Nos. 15 and 16 of 1948.

Madras Tenants' and Ryots' Protection Act (XVII of 1946), *section* 4, *clause* 3—*More than one proceeding for sale of holding pending—Stay of proceedings—Single deposit of two years' rent—Sufficiency.*

Where there are more than one proceeding for sale of a holding to recover rent, it is not necessary for the tenant to deposit in each proceeding either the amount payable under the decree or order if any or an amount equivalent to the rent for two years' preceding the commencement of the Act whichever is less as the case may be.

Section 4, sub-clause (3) of Act XVII of 1946 requires only one deposit of the maximum amount equivalent to rent for two years immediately preceding the commencement of the Act to entitle the tenant to claim that all proceedings for sale of that holding should be stayed under the Act. If there be two decrees in execution it would be necessary to pay the aggregate of both the decree amounts or an amount equivalent to rent for two years immediately preceding the commencement of the Act whichever is less. Where the proceedings are in different

Courts the deposit may be made in any of the Courts where a proceeding is pending and the fact of that deposit having been made may be intimated to the other Court where another proceeding for sale of the holding is going on and it will be the duty of that Court to stay the proceeding before it where it is satisfied that deposit of the required amount has been made in the other Court though not before itself.

C. S. Swaminathan for Appellants.

N. Sundara Aiyar for Respondents.

K.S. *Appeals allowed. Leave to appeal refused.*

Rajamannar, C.J. and Yahya Ali, J.
16th August, 1948.

Nagayya *v.* The Commissioner of Income-tax, Madras.
Case Refd. No. 35 of 1947.

Income-tax Act (XI of 1922), *section* 4 (1) (c), *if abrogated by section* 42 (3)*—Residents and non-residents—Distinction.*

With regard to profits which have accrued and arisen, a distinction is made in the Income-tax Act between residents and non-residents. It is provided in the case of residents that all income which accrues or arises, *whether within or without British India,* is taxable. In the case of non-residents, income which accrues or arises or is deemed to accrue or arise in *British India alone* is taxable (apart from cases covered by section 4 (1) (*a*) which apply to residents and non-residents alike) and it is only to define in what cases income, profits and gains are deemed to accrue or arise that provision is made in section 42 and other sections. The relief under section 42, sub-section (3) applies only to a case in which the profits and gains are deemed under section 42 to accrue or arise or are received in British India.

M. Subbaraya Aiyar for Applicant.

S. Krishnamachari for *C. S. Rama Rao Sahib* for Respondent.

K.S. *Reference answered.*

Satyanarayana Rao, J.
18th August, 1948.

Subbamma *v.* Narayanamurthi.
S. A. No. 2078 of 1946.

Civil Procedure Code (V of 1908), *section* 91 *and Order* 1, *rule* 8*—Obstruction to village pathway—Suit in representative capacity for removal of obstruction—Proof of special damage—If essential—Village pathway—Representative suit—Maintainability.*

It is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General under section 91, Civil Procedure Code and even without proof of special damage.

Very often courts have to deal with the infringement of the rights of the residents of a village or a section of a community in pathways, wells and banks of rivers and so on. Infringement of such rights cannot be deemed to constitute a public nuisance within the meaning of section 91, Civil Procedure Code or within the meaning of section 268, Indian Penal Code. A member of such class can file a representative suit under Order 1, rule 8, Civil Procedure Code, for relief in respect of infringement of such rights.

Ch. Raghava Rao for Appellant.

Respondents not represented at the time of hearing.

K.S. *Appeal dismissed. Leave to appeal refused.*

Horwill and Panchapakesa Sastri, JJ.
18th August, 1948.

Sivaramamurthi Naidu *v.* Satyanarayana Naidu.
C. M. P. No. 3089 of 1948.

Federal Court Enlargement of Jurisdiction Act (I of 1948) *and Civil Procedure Code (V of* 1908), *sections* 109 *and* 110 *and Order* 45, *rule* 2*—Leave to appeal to Federal Court—Order of High Court remanding suit for disposal—When "final."*

In a suit for partition fourteen issues were framed. The trial Court found that the suit was not maintainable in view of the allegation that there was a prior

partition. No finding at all was given with regard to issues relating to the debts of the family, and the assets and liabilities but the Court directed that these matters might be determined by a commission in the course of execution. In appeal the High Court held that there was no prior partition and the suit was therefore maintainable and remanded the suit for disposal after the trial Court had given findings with regard to the issues relating to the debts, assets and liabilities. In an application for leave to appeal to the Federal Court against that order,

Held, the order was not a " final order " as important questions relevant to a partition suit had not been decided by the Court and therefore leave cannot be granted to appeal to the Federal Court.

Case-law discussed.

D. V. Reddi Pantulu for Petitioners.

A. L. Narayana Rao and *S. Ramamurthy* for Respondents.

K.S. ——— *Petition dismissed.*

Rajamannar, C.J. and Yahya Ali, J.
20th August, 1948.

Avvaru Chinna Rangiah *v.* The Commissioner of Income-tax, Madras.
Refd. Case No. 43 of 1947.

Income-tax Act (XI of 1922), *section* 26-A—*Registration of firm consisting of member of joint Hindu family and quandom minor coparceners—Effect—If bar to assessment of income in the hands of person who actually received it.*

The registration of a firm in accordance with the distributive shares stipulated in a partnership instrument does not operate as a bar or estoppel against the Income-tax officer making the assessment in the hands of persons who actually received the particular income. The apportionment of income can only be made with reference to the distributive shares stipulated in the instrument, having regard to the period of time covered by the instrument. Where a firm which was registered consisted of the members of a joint Hindu family, assessment for the period before registration can be made on the footing of an association of persons, so that the manager may not experience any difficulty in the matter of being able to recoup a share of the tax from the family.

M. Subbaraya Aiyar for Applicant.

C. S. Rama Rao Sahib for Respondent.

K.S. ——— *Reference answered.*

Govinda Menon, J.
20th August, 1948.

Venkatachalam Chetty *v.* Rangaswami Chetty.
Cr. R. C. No. 766 of 1948.
(Cr. R. P. No. 722 of 1948).

Criminal Procedure Code (V of 1898), *section* 528—*District Magistrate transferring application under section* 145, *Criminal Procedure Code to file of a First Class Magistrate who then made a preliminary order—First Class Magistrate found not to have territorial jurisdiction over some of the properties—Jurisdiction of District Magistrate to withdraw case and take it on his own file.*

No doubt the general rule is that proceedings instituted in a Court which has no jurisdiction in respect of them cannot be regarded as legally instituted and a superior Court cannot transfer them to a Court having jurisdiction and thereby cure a defect. But it cannot be said that a power of transfer once exercised under section 528 of the Criminal Procedure Code cannot be any further invoked for the purpose of correcting an inadvertent and unthought of mistake.

Where a District Magistrate had transferred an application under section 145 of the Criminal Procedure Code to a First Class Magistrate and after the First Class Magistrate makes a preliminary order it is found that he had no territorial jurisdiction over some of the properties in dispute, the District Magistrate who transferred the case has jurisdiction to withdraw the case and take it on his own file and rectify the mistake.

V. T. Rangaswami Aiyangar for Petitioners.

V. Rajagopalachari and *V. Seshadri* for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Rajamannar, C.J. and Yahya Ali, J. 26*th August*, 1948.

The Calico Printers Association, Ltd. *v.* Commissioner of Income-tax, Madras. Case Refd. No. 39 of 1947.

Income-tax Act (XI of 1922)*—Purchase of shares by assessee with an understanding that the vendor should procure a declaration of dividend which was to be paid over by the vendee to the vendor as part of price of the shares—Dividend so declared—If income of purchaser liable to tax.*

Where there is a purchase of shares by the assessee on the understanding that the vendor who owned practically all the shares should procure a declaration of dividend which was to be paid over by the purchaser to the vendor as part of the price of the shares purchased, the dividend will be the income of the purchaser assessable to income-tax though under the agreement it had to be paid over to the vendor.

M. Subbaraya Aiyar for Applicant.

C. S. Rama Rao Sahib for Respondent.

K.S. ——— *Reference answered.*

Govinda Menon and Mack, JJ. 31*st August*, 1948.

Narasimhan *v.* The Commissioner of Police, Madras. Cr.M.P. No. 1142 of 1948.

Madras Maintenance of Public Order Act (I of 1947), *section* 3 (1)*—Scope—Giving the detenu the grounds on which order has been made against him—If should be in one lot—Giving additional grounds subsequently—Legality.*

All that section 3 (1) of the Madras Maintenance of Public Order Act says is that a detenu should be given "the grounds on which the order has been made against him and such other particulars...." Nowhere is there any restriction that the entire grounds should be given in one lot. Accordingly there is no bar to the giving of additional grounds for the detention after some grounds had already been given.

A. K. Pillai for *Messrs. Row and Reddi* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) as the Crown Prosecutor on behalf of the Crown.

K. S. ——— *Petition dismissed.*

Govinda Menon and Mack, JJ. 31*st August*, 1948.

Ghouse Mohideen *In re.* Cr.M.P. Nos. 1135 and 1136 of 1948.

Madras Maintenance of Public Order Act (I of 1947), *sections* 2 (1) *and* 15*—Orders of detention—Powers of District Magistrate to pass.*

In section 15 of the Madras Maintenance of Public Order Act, the power to issue detention orders is delegated to the District Magistrate and there is nothing illegal in the Provincial Government instructing the Collector to issue a detention order and supporting it by grounds in the form of a Government memorandum later. An order of detention cannot be challenged on the ground that it was issued by the District Magistrate and not by the Provincial Government itself under section 2 (1) (*a*) of the Act.

Md. Askar Ali and *A. A. S. Mustafa* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Rajagopalan, J. Somu Thevar *v.* Abida Bivi.
6th August, 1948. A.A.O. No. 653 of 1946.

Civil Procedure Code (V of 1908), Order 41, rule 23—Power of appellate Court to remand the case—Jurisdiction to exercise where Order 41, rule 27 is applicable and additional evidence is considered necessary to dispose of the questions at issue.

It cannot be said that where additional evidence had to be called for under Order 41, rule 27 of the Code of Civil Procedure the appellate Court had no jurisdiction at all to apply Order 41, rule 23 and remand the suit for disposal afresh. The provisions of Order 41, rule 23 are wide enough to include even cases where additional evidence is considered necessary to dispose of the questions at issue.

The propriety of an order of remand, however, will depend on the facts and circumstances of each case.

(1943) 2 M.L.J. 312; (1938) 2 M.L.J. 648 and (1940) 1 M.L.J. 60, considered.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Petitioner.

K. S. Desikan for Respondent.

K.S. *Appeal dismissed. Leave to appeal granted.*

Govinda Menon, J. Satyanarayana *v.* Satyanarayana.
10th August, 1948. C.R.P. No. 912 of 1946.

Agency—Money received by agent from principal's debtor but not paid over to principal—Agent if liable to principal's debtor personally.

An agent is not personally liable to his principal's debtor for misappropriation or non-payment of the money received from such debtor to be paid over to his principal who was the creditor. Unless there is either a privity of contract or other legal relationship, or quasi legal relationship, or claims founded on torts a person cannot bring a suit against the agent of another.

E. Venkatesam for Petitioner.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondent.

K.S. *Petition allowed.*

Horwill, J. Maharaja of Pittapuram *v.* Venkataraju.
11th August, 1948. S.A. No. 1395 of 1948.

Limitation—Collection by Zamindar of rent on inam land not liable to pay rent—Suit for declaration that inamdar was entitled to enjoy land free of rent—Limitation—Starting point.

The collection by a Zamindar of rent from an inamdar (entitled to enjoy the land free of rent) however long continued will be wrongful and every time the Zamindar demanded rent which was not legally payable by the inamdar, the demand gave rise to a fresh cause of action.

I.L.R. 33 Mad. 171, relied on.

I.L.R. 47 Mad. 572, considered.

Ch. Raghava Rao for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S. *Appeal dismissed.*

Rajagopalan, J. Sankaranarayana Kadambalithaya *v.* Vasudeva Achuta Hebbara.
13th August, 1948. C.R.P. No. 1222 of 1947.

Court-fee—Decision by Court as to adequacy of court-fee paid—Issue as to court-fee again framed by successor of the judicial officer after filing of written statement—Jurisdiction of Court to again go into question as to the adequacy of the court-fee.

An order by the Court as to the adequacy of court-fee paid on a plaint before it is ordered to be filed is a judicial decision which precluded any successor of the same judicial officer in that Court from re-opening the question of adequacy of the court-fee already paid after framing an issue on the filing of the written statement. Any error committed by the judicial officer in deciding the adequacy of court-fee can thereafter only be corrected under the provisions of section 12, clause (2) of the Court-Fees Act.

N R C

(1946) 1 M.L.J. 459, distinguished.

69 M.L.J. 479, applied.

K. Srinivasa Rao for Petitioner.

Respondent not represented.

K.S. *Petition allowed.*

Satyanarayana Rao, J.
13th August, 1948.

Narayanaswamy Reddiar *v.* Pudukottah Industrial Corporation.
A.A.O. No. 56 of 1947.

Civil Procedure Code (*V of* 1908), *section* 13 (*b*)—*Foreign judgment—Judgment on merits—Test—Reasons for judgment—If essential.*

In cases where the Court records evidence and passes a judgment in favour of the plaintiff it must be deemed that even though reasons were not given in the judgment, the Judge must have applied his mind to the evidence on record and must have been satisfied that the case of the plaintiff was established to his satisfaction and that therefore that it was a fit case in which a decree in favour of the plaintiff should follow. Such a judgment is one on merits and the decree based on it can be executed.

B. Pocker, A.K. Balakrishnan and *P.A. Quadir Meeran Sahib* for Appellant.

S. Ramachandra Aiyar and *K. Gopalaswamy* for Respondents.

K.S. *Petition dismissed.*

Satyanarayana Rao, J.
16th August, 1948.

Pappammal *v.* Sivanmalai Goundan.
A.A.O. No. 134 of 1947.

Civil Procedure Code (*V of* 1908), *section* 11—*Appellate decision confirming trial Court's decision without saying any thing about a finding on a substantial issue—Trial Court's finding on such issue—If* res judicata.

Where there was a finding on an issue which was directly and substantially in issue between the parties by the trial Court and an appeal was preferred by the unsuccessful party against the ultimate decision in the suit and nothing was said in the appellate judgment about that finding one way or the other and the decree of the appellate Judge which confirms that of the first Court proceeds on the basis that that finding was correct, the issue so decided by the trial Court and on which there was no express decision by the appellate court would operate as *res judicata.*

I.L.R. 28 Mad. 338, applied.

K. S. Ramamurthi and *V. Seshadri* for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S. *Appeal allowed. Leave to appeal refused.*

Panchapagesa Sastry, J.
17th August, 1948.

Devaki Ammal *v.* Manavala Pillai.
C.C.C.A. No. 4 of 1947.

Husband and wife—Absence of proof of marriage—Widow living in concubinage with a married man long prior to the alleged marriage which was not proved—Inference of lawful marriage from their living together—If proper—Necessity for providing system of registration of marriage.

Where in a suit for maintenance by a woman against a man alleging that she was his wife it is found that she was a widow living in concubinage with that man for a considerable time before the alleged date of marriage which is not proved and the man himself had his lawfully wedded wife living all along, it cannot be said that the parties lived together as man and wife and also passed in society as such for a long time so as to infer therefrom a lawful marriage. In such a case there is no room for making any presumption of marriage.

(1947) 2 M.L.J. 277, distinguished.

The system of concubinage not being unusual the necessity for a proper system of registration of marriages (optional if not compulsory) pointed out.

K. V. Ramachandra Aiyar, Messrs. C. A. Mahomed Ibrahim and *T. S. Santhanam, Messrs. P. Jayachandra Naidu* and *C. Chandramurthi* for Appellant.

N. K. Mohanarangam Pillai, M. V. Gopalaratnam and *T. P. Kannabhiran* for Respondent.

K.S. ——— *Appeal dismissed.*

Rajamannar, C.J. and Satyanarayana Rao, J. Manickam *v.* MR. RM. Ramanathan Chettiar.
23rd August, 1948.

C.M.P. Nos. 5101 to 5129 of 1946.

Civil Procedure Code (V of 1908), *section* 115—*Abatement—Order* 22, *Civil Procedure Code and Limitation Act (IX of* 1908), *Schedule I—Not applicable to revision petitions.*

There is no provision in the Code of Civil Procedure making the provisions of Order 22 applicable to Civil Revision Petitions. Likewise there is nothing in the Indian Limitation Act making any of the Articles to Schedule I of that Act applicable to Civil Revision Petitions. There is no provision even in the Appellate Side Rules prescribing a time limit for any application such as one for bringing on record legal representatives in place of the deceased respondent in Civil Revision Petitions. There can be no question of abatement in cases of Civil Revision Petitions and the legal representatives of a deceased respondent can be added as parties.

A.I.R. 1938 Mad. 115, overruled.

A. Sundaram Aiyar for Petitioners.

A. Kuppuswamy for *K. Umamaheswaram* for Respondents.

K.S. ——— *Petitions allowed.*

Rajamannar, C.J. and Yahya Ali, J. Mahomed Abdul Kareem & Co., Madura *v.* Commissioner of Income-tax, Madras.
23rd August, 1948.

Case Referred Nos. 18 and 19 of 1947.

Income-tax Act (XI of 1922), *section* 3—*Construction—Association of persons—Meaning—Association if must be for a lawful purpose—Partnerships between the lessees of arrack and toddy shops to run the shops in partnership—Liability to assessment as "association of persons" after rejection of application to be registered as "firms."*

Persons who had taken leases of arrack shops in one case and toddy shops in another, separately constituted themselves into a partnership and agreed that the respective firms should run all the toddy and arrack shops taken on lease by the partners. An application for registration of the firm under section 26-A of the Income-tax Act was rejected for the reason that the formation of a partnership with regard to arrack and toddy shops was prohibited by the Abkari law without the previous permission of the District Collector. The firm was assessed as "an association of persons", and the assessee claimed that it was not such an association.

Held : The words "other association of persons" in section 3 of the Income-tax Act have to be construed in their plain ordinary meaning and not *ejusdem generis* with the word "firm" immediately preceding or the words going before that word. So long as it is an association which produced income, profits or gains, it is assessable to tax by force of section 3. It is unnecessary in order to constitute an association that there should be any mutual rights or obligations among the members, enforceable in a Court of law. So long as the object of the association is to carry on for gain a business which is not unlawful—the object in the present case being to sell arrack or toddy as the case may be under the authority of a licence duly granted by the Government—the supervening circumstance of the formation of a partnership in contravention of the Abkari law does not render the income, profits and gains of the association immune from taxation.

T. L. Venkatarama Aiyar for Applicants.

C. S. Rama Rao Sahib for Respondent.

K.S. ——— *Reference answered.*

Horwill, J. Velu *v.* Parakkutty.
30th August, 1948. S.A. No. 132 of 1946.

Malabar Law—Kanom—*Decree for redemption not executed—Another suit for same relief—Sustainability.*

Where a person who has obtained a decree for the redemption of a *Kanom* did not execute it, another suit asking for the same relief (redemption) lies. Case-law discussed.

(1948) 2 M.L.J. 293, relied on.

T. C. Raghavan for Appellant.

N. Gopala Menon for Respondent.

K.S. ——— *Appeal allowed.*

Govinda Menon and Mack, JJ. Narayanaswamy Naidu *v.* Inspector of Police, Mayavaram.
31st August, 1948. Cr. M. P. No. 1072 of 1948.

Madras Maintenance of Public Order Act (*I of* 1947)—*Order for detention not stated to be in the name of His Excellency the Governor—Validity.*

Where the Government order of detention did not make mention of the fact that it was issued under the authority and by the order of His Excellency the Governor, but was signed only by the Chief Secretary to the Government, it cannot be said that the order does not conform to section 59 (1) of the Constitution Act (according to which all executive actions of the Government shall be expressed to be taken in the name of His Excellency the Governor). The defect if any is only one of form and not of substance and the validity of the order will not be affected.

A. K. Pillai for *Messrs. Row and Reddy* and *S. Krishnamurthy* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Horwill, J. Pulleswara Rao *v.* Satyanarayanamurthi.
31st August, 1948. C.R.P. Nos. 888 and 889 of 1947.

Provincial Insolvency Act (*V of* 1920), *section* 78 (2)—*Insolvency of Hindu father—Debt of father—Enforcement against sons on ground of pious obligation—Limitation.*

Where by reason of the provisions of section 78 (2) of the Provincial Insolvency Act the debt of a Hindu father who has been adjudicated as insolvent is not barred by limitation, an action against the sons to enforce the debt on the ground of their pious obligation is also not barred by limitation.

(1944) 2 M.L.J. 158, relied on.

(1947) 2 M.L.J. 85, distinguished.

V. Parthasarathi for Petitioner.

D. Narasaraju for Respondent.

K.S. ——— *Petitions dismissed.*

Govinda Menon and Mack, JJ. Kripapuri *v.* The District Magistrate, Tiruchirappalli.
2nd September, 1948. Cr. M. P. No. 1311 of 1948.

Madras Maintenance of Public Order Act (*I of* 1947)—*Activities of person which will amount to offences under ordinary law—Detention under the Maintenance of Public Order Act—If illegal—State if should only put him for trial before the ordinary Criminal Court and get him convicted for the offence.*

Even if the activities of a person mentioned in the grounds of his detention under the Maintenance of Public Order Act amount to offences under the Indian Penal Code, it cannot be contended that his detention is illegal or against the Maintenance of Public Order Act on the ground that the Provincial Government did not take steps to get him convicted in the ordinary Criminal Court. It cannot be said that it is obligatory upon the Provincial Government to bring him before a Court of criminal law and get him punished if by another remedy they can prevent him from continuing his activities.

A. Ramachandran for *Messrs. Row and Reddy* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Rajamannar, C.J. and Satyanarayana Rao, J. Krishnaswamy Aiyar *v.* Mohanlal Binjani.
2nd September, 1948. C.M.P. No. 2689 of 1948.

Certiorari—*Grounds for issue of—Error of law apparent on the face of the record—If sufficient ground.*

Where there is an error apparent on the face of the order of the Chief Judge of Small Cause Court in an appeal against the order of the House Rent Controller the High Court will issue a writ of *certiorari* to quash the order.

Case-law discussed.

T. R. Venkatarama Sastri and *R. Rajagopala Ayyangar* for Petitioner.

V. K. Thiruvenkatachari and *U. S. Ramaswami Ayyar* for Respondent.

K.S. ——— *Order quashed.*

Rajamannar, C.J. and Yahya Ali, J. The Commissioner of Income-tax, Madras
3rd September, 1948. *v.* Siddareddy Venkatasubba Reddy and Brothers.
Case Referred No. 27 of 1946.

Income-tax Act (XI of 1922), *section* 10 (2)—*Business of winning and selling mica—Money expended for acquiring mining rights are of capital nature.*

Where the assessee carries on the business of winning and selling mica, money expended for acquiring mining rights in various places for such business must be held to be capital expenditure in respect of which the assessee will not be entitled to any deduction under section 10 (2) of the Income-tax Act.

Authorities discussed.

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondents.

K.S. ——— *Reference answered.*

Rajamannar, C.J. and Satyanarayana Rao, J. Singaravelu *v.* Pattammal.
7th September, 1948. O.S.A. No. 35 of 1948.

Hindu Law—Husband and wife—Decree for maintenance in favour of wife—Execution—Plea against on the ground that rights were forfeited by subsequent unchaste life of the decree-holder—If sustainable—Executing Court if can go behind decree—Remedy of judgment-debtor.

An application by a wife against her husband for execution of a decree for maintenance was resisted on the ground that the wife by leading an unchaste life subsequent to the passing of the decree had forfeited her rights to maintenance and that therefore the decree became inexecutable.

Held : Though it may be that under Hindu law a wife is not entitled to maintenance even when such maintenance is fixed by a decree, if she is unchaste, where the decree is not conditional in any manner, the husband's remedy can only be by way of a separate suit and not by way of an objection to the execution of the decree. The executing Court cannot go behind the decree.

I.L.R. 26 Bom. 707, applied.

I.L.R. 1942 Mad. 24, distinguished.

M. S. Venkatarama Aiyar and *S. Viswanathan* for Appellant.

M. A. Janaki for Respondent.

K.S. ——— *Appeal dismissed.*

Panchapagesa Aiyar, J. Muhammad Ibrahim Sahib *v.* Krishna Rao.
9th September, 1948. C.R.P. No. 813 of 1947.

Court-fee—Order for delivery of property on condition of depositing certain moneys in Court by certain date—Private purchaser from person in whose favour order is made—Obstruction by stranger to possession—Dismissal summarily of application for possession free of obstruction—Suit for possession—Court-fee.

A private purchaser from a party (in whose favour delivery of possession of properties was ordered) in a preliminary decree on condition of his depositing certain moneys in Court by a certain date but who had failed to satisfy the condition

and get an unconditional order of delivery of possession of the properties was afterwards obstructed by persons not parties to the suit and a petition under Order 21, rule 97 of the Civil Procedure Code for delivery free from their obstruction was dismissed summarily without investigation and he was directed to file a suit against the obstructors in the usual course for possession of the properties. On the question of court-fee payable in respect of such suit,

Held : A court-fee on the market value of the properties must be paid and the plaintiff cannot claim to pay a court-fee of Rs. 15 for such relief under Article 17, clause (i) of Schedule II of the Court-Fees Act.

R. Desikan for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*),for Government.

V. S. Rangaswami Aiyangar and *P. R. Vasudeva Aiyar* for Respondents.

K.S. ——— *Petition dismissed.*

Rajamannar, C.J. and Satyanarayana Rao, J. Kanniah Lal *v.* Corporation of Madras.
9th September, 1948. L.P.A. No. 51 of 1948.

Madras City Municipal Act (IV of 1919), *section* 304-B—*Construction*—"*Gross income*"—*Meaning*—*Owner of private market letting out to contractor the right to collect stall-fees in a private market*—"*Income*" *for computing licence fee*—*Amount paid by contractor to owner or actual amount collected from stall-holders by contractor*—"*Owner*" *in section* 3 (17) *of the Act*—*If includes the contractor.*

The licence for keeping open a private market is granted to the owner. It is the person to whom licence is granted that can levy the fee or fees of the nature specified in sub-section (2) of section 301 of the Madras City Municipal Act. The licence fee which such person is liable to pay is a fee not exceeding 15 per cent. of his "gross income" from the market. The "gross income" really is the income derived by the levy of fees from the stall-holders. The fact that under a contract between such owner and a contractor, the latter actually collects such fees from the stall-holders and pays only a fixed sum to the owner cannot make any difference in the legal position. The word "owner" in section 304-B of the Act can only refer to the owner of the market to whom a licence has been granted under section 304. It is doubtful if a person like a contractor who has been permitted to collect the fees which are leviable under the licence can be said to be a person entitled to receive the rents and profits of the property so as to bring such person within the definition of "owner" in section 3 (17) of the Madras City Municipal Act.

V. Rajagopala Mudaliar for Appellant.

K.S. ——— *Appeal dismissed.*

Govinda Menon and Mack, JJ. Narasimha Rao *v.* Inspector, Special
10th September, 1948. Branch, East Godavari District.
Cr.M.P. No. 1308 of 1948.

Madras Maintenance of Public Order Act (I of 1947)—*Detenu completely renouncing all forms of subversive activities and mischievous propaganda*—*Further detention not* bona fide.

Where the Court is satisfied that a detenu has completely renounced all forms of subversive activities and mischievous propaganda and has ceased to be a communist his further detention under the Madras Maintenance of Public Order Act, 1947, which is solely preventive would be clearly not *bona fide* and he must be released.

K. Krishnamurthi and *J. Suryanarayana* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Mack, J. Abdul Rahim *v.* The Official Assignee of Madras.
13th August, 1948. O.S.A. No. 5 of 1948.

Presidency Towns Insolvency Act (*III of* 1909), *sections* 17 *and* 52—*Scope and effect—After-acquired property of undischarged insolvent—Vesting in the Official Assignee—Intervention of Official Assignee not necessary—Anomaly and differences in insolvency law between Presidency town and moffusil—Need for abolition by legislation pointed out.*

The moment a property is acquired by or devolves on an undischarged insolvent, such property becomes *eo instanti* vested in the Official Assignee or Receiver. No distinction is made between property belonging to and vested in the insolvent at the commencement of the insolvency and property which may be acquired by or devolve on him subsequent to the adjudication and before discharge. Both kinds of property are comprised in the property of the insolvent divisible among his creditors. Both kinds of property vest in the Official Assignee or the trustee in bankruptcy and they vest in him in precisely the same manner.

The distinction between real and personal property made in England in applying the rule of postponement of vesting of after-acquired property till intervention by the trustee cannot be properly applied in India.

There is no difference in India between moveable and immoveable property of an insolvent for the purpose of vesting in the Official Assignee.

Case-law discussed.

Difference between English and Indian law pointed out. Desirability of Legislature intervening and abolishing anomalies and differences between the law of insolvency applying to Presidency towns and that applying to the moffusil stressed.

Per *Mack, J.*—The important differences between the policy of the English Bankruptcy Statutes and Indian Insolvency Legislation towards uncertified bankrupts and undischarged insolvents discussed.

Nagarajan and *Salam* for Appellants.

The Official Assignee of Madras (Respondent).

K.S. *Appeal dismissed.*

Panchapagesa Sastri, J. Maharaja of Pittapuram *v.* Narayya.
18th August, 1948. A.A.A.O. Nos. 57 to 61 of 1946.

Civil Procedure Code (*V of* 1908), *section* 144 *and Order* 21, *rule* 19—*Second appeal confirming decree against ryots for rent but making each party bear its costs in the lower Courts—Execution of decree for rent—Ryot if can claim to set-off costs already paid in pursuance of the lower Court decree.*

An application for restitution under section 144 of the Code of Civil Procedure is really one in execution and the provisions of Order 21, rule 19 would apply to it. Even apart from it, where on second appeal in the High Court, decrees for rent passed by the lower Courts against the ryots stood confirmed but each party was directed to bear its own costs in the first two Courts and the ryots were made to pay the present appellant's costs in the High Court, the ryots who had paid the costs of the landlord in the lower Courts pending their second appeals can set-off the costs so paid against the decree for rent in proceedings for execution taken out by the landlord.

Ch. Raghava Rao for Appellant.

V. Viyyanna for Respondent.

K.S. *Appeal dismissed. Leave to appeal refused.*

Horwill, J. Lakshmi Ammal *v.* Thangathammal.
23rd August, 1948. S. A. No. 128 of 1946.

Contract Act (*IX of* 1872), *section* 23—*Settlement of property on girl's mother in pursuance of arrangement that the girl should marry settlor's daughter's son—Contract if legal—Right of settlor to recover the property before the marriage takes place.*

X, when his death was approaching, was desirous of effecting a marriage between *A*, his daughter, and *M*, the daughter's son of a deceased *pangali* of his

At the same time he expressed a desire that the boy's grand-mother *Y* should settle a little property on the girl's mother and the greater part of the remainder on *M*. After *X* died, *Y* did settle the greater part of her property on *M* and on the same day she executed a document in favour of the girl's mother who had no property of her own. The material portion of the document was as follows :—" Since you are the daughter-in-law of *P* the younger brother of my husband [he was in fact only a *pangali*] and since your husband [the son of the said *P* and the reversioner to my property] declared orally at the time of his death that his daughter should be married to my daughter's son, that I should give 3/8th cawnie for your maintenance and that I should give my properties to the said *M* himself, and *since it has been settled* to give your daughter in marriage to my daughter's son *M*, in accordance therewith, I have put you in possession of the property mentioned hereunder and executed this settlement deed." On a question as to the right of the settlor to recover the property before the marriage takes place,

Held : In effect there was not a gift but a conveyance for consideration, the consideration being that the daughter of *X* should be given in marriage to *Y's* daughter's son. As the marriage had not taken place the contract cannot be enforced and *Y* is entitled to return of the property conveyed in pursuance of that void contract. Where however an illegal contract is given effect to and becomes executed then the property conveyed under the contract cannot be recovered.

L.R. 16 Equity 275 and 42 I.C. 265, distinguished.

T. A. Anantha Aiyar for Appellant.

M. S. Vaidyanatha Aiyar for Respondent.

K.S. ——— *Appeal allowed.*

Panchapagesa Aiyar, J. Chinna Thevar *v.* Krishnaswami.
9th September, 1948. C. R. P. No. 1040 of 1947.

Court-Fees Act (VII of 1870), *section* 7, *clause* (5)—*Person claiming an item by title paramount struck off from mortgage suit—Mortgage decree including such item claimed by the exonerated party—Suit for declaration that this property was not bound by the decree—Court-fee.*

A person interested in an item of property was exonerated from a previous mortgage suit as he claimed by title paramount. Though he was struck off from the suit his property was included in the mortgage decree in that suit. In a suit for declaration that the decree was not binding on the plaintiff,

Held, the subject-matter of the suit for purposes of jurisdiction and Court-fee should be valued at the amount or value of the property which the plaintiff claimed was not bound by the decree, as if the suit was one for the possession of such property. The court-fee payable will be only under section 7 clause 5 of the Court-Fees Act and he need not pay court-fee on the value of the decree.

G. T. Ramanujachari and *A. V. Avudainayagam* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *C. S. Rajappa* for Respondent.

K.S. ——— *Order modified.*

Panchapagesa Aiyar, J. Chinna Punnayya *v.* Badurinnissa Begum.
13th September, 1948. C.R.P. No. 955 of 1947.

Court-fee—Plaint praying for alternative reliefs of redemption of mortgage or specific performance of agreement to re-convey—Two distinct causes of action valuable at their aggregate amount for purposes of court-fee and jurisdiction.

Alternative reliefs for redemption of a mortgage and specific performance of an agreement to re-convey valued by the plaintiff at Rs. 2,000 and

Rs. 2,567-7-0 respectively must be considered to be two distinct causes of action, valuable at their aggregate amount for the purposes of court-fee and jurisdiction. I.L.R. 30 Mad. 61 and (1948) 2 M.L.J. 104, relied on.

The claim for redemption arose out of the original mortgage, while the claim for specific performance was a distinct relief arising out of an alleged agreement to re-convey, which was disputed.

K. Kameswara Rao and *N. Ramamohan Rao* for Petitioner.

K. Krishnamurthi for Respondent.

K.S. ——— *Petition allowed.*

Panchapagesa Aiyar, J. Seshamma *v.* Seetharamaswami

13th September, 1948. C. R. P. No. 1092 of 1947.

Civil Procedure Code (V of 1908), *section* 15, *Order* 6, *rule* 17 *and Order* 7, *rule* 10—*Plaint valuation beyond pecuniary jurisdiction—Application to amend so as to restrict the prayers to half the property so as to bring it within jurisdiction—If can be entertained—Proper procedure.*

Whenever a Court finds that a suit beyond its pecuniary jurisdiction is filed before it, the only course for it is to return the plaint for presentation to the proper Court. It is then for the plaintiff either to amend it and bring it within the jurisdiction of the Court and re-present it before the period of limitation has expired, or to present it without any amendment to the Court having jurisdiction to entertain it, and then, if he likes, pray for whatever amendments he wants, in that Court. Where the commissioner's valuation of the property is in excess of its pecuniary jurisdiction the Court if it allows that valuation to stand cannot entertain and allow an amendment petition restricting the prayers to one half of the properties and thus enable the Court to have jurisdiction. The Court will not be justified in entertaining the amendment petition and allowing it, without declaring that the valuation of the commissioner was excessive, and that the suit was within its pecuniary jurisdiction. If it exceeded its pecuniary jurisdiction, its clear duty will be to return the plaint for presentation to the proper Court. To allow Courts having no jurisdiction to pass orders in amendment petitions, or any other similar orders, would be to enable them to snatch at jurisdiction, and would be against the policy of the law.

Ch. Raghava Rao and *Ch. Suryanarayana* for Petitioner.

M. S. Ramachandra Rao for Respondent.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Panchapagesa Aiyar, J. Mahamed Yusuf Saheb *v.* Bhashyam Naidu.

15th September, 1948. C. M. P. Nos. 3340, etc., of 1948.

Certiorari—*Application for issue of writ of—High Court disposing of—If can admit additional evidence.*

There is no provision of law under which the High Court when disposing of an application for the issue of a writ of *certiorari* (to quash the order of the Chief Judge of the Court of Small Causes reversing the decision of the Rent Controller, Madras and directing the tenant to deliver possession to the landlord) can admit additional evidence (to prove a tender of rent by the tenant).

M. S. Venkatarama Aiyar for Petitioner.

P. Somasundaram and *T. K. Rangaswami* for Respondents.

K.S. ——— *Applications dismissed.*

Subba Rao, J. Varadarajulu Chetty *v.* Ramalingam Chettiar.

16th September, 1948. Crl. Appeal No. 17 of 1948.

Penal Code (XLV of 1860), *section* 408—*Gist of offence under—Dishonest intention—Necessity.*

A person could be convicted under section 408 of the Indian Penal Code, if he had converted some hundies for his own use with a dishonest intention. If

the complainant had authorised him to receive the amounts due under the hundies or though not authorised, the accused as partner of the complainant had realised the amounts and appropriated the same towards the debt due to him, it would not be possible to say that he acted with a dishonest intention.

V. Rajagopalachari, *C. Deenadayalu* and *R. V. Raghavan* for Appellant (Accused).

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

A. Nagarajan and *R. Purushotham* for Respondent (Complainant).

K.S. ——— *Appeal allowed.*

Rajagopalan, J. Manicka Goundan *v.* Krishna Goundan.

16*th September*, 1948. C. R. P. Nos. 1337 of 1947, etc.

Civil Procedure Code (*V of* 1908), *Order* 5, *rule* 19 *and Order* 9, *rule* 13—*Duty of Court to record finding after return of summons that summons has been duly served before it can pass* ex parte *decree.*

The only material on which a Court could come to a conclusion that a summons had been duly served is the endorsement verified on oath on the summons itself. Without an order that the defendant had been duly served the Court is not entitled to proceed with the enquiry *ex parte* and pass a decree. Where a summons is returned after the passing of the *ex parte* decree, the fact that there is an endorsement that summons had been tendered and refused on a date which is prior to the date of the *ex parte* decree, in no way affects the question whether the Court could on the material before it when it passed the decree come to the conclusion that the defendant had been duly served. The subsequent intervention by the defendant on an application under Order 9, rule 13, Civil Procedure Code in no way affects his right to have the decree wrongly passed *ex parte* set aside in revision especially when he had filed a revision petition against the order dismissing his application under Order 9, rule 13.

39 M.L.J. 697, distinguished.

A. Seshachari and *A. Srinivasan* for Petitioners.

A. V. Viswanatha Sastri for Respondents.

K.S. ——— *Petition allowed.*

Subba Rao, J. Mathias, *In re.*

17*th September*, 1948. Cr. R. C. No. 198 of 1948.
(Cr. R. P. No. 189 of 1948).

Motor Vehicles Act (*IV of* 1939), *section* 87 (1)—*Failure of person in charge of motor vehicle to stop when required to do so by the police—Offence—Duty of prosecution to prove that the police officer concerned was "in uniform."*

The Legislature purposely added in the amending Act, the words "in uniform". It is not permissible to ignore that ingredient of the offence. It is the duty of the prosecution to adduce evidence to establish that the police officer concerned was in uniform at the time when the alleged offence (of failing to stop a motor vehicle when required to do so by a police officer) was committed. Where the prosecution fails to prove that the police officer concerned was in uniform it is a very important defect and it must be held that the prosecution had not proved that the accused committed the offence within the meaning of section 87 (1) (*a*) of the Motor Vehicles Act.

M. Santosh for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Revision Petition allowed.*

Satyanarayana Rao, J. Ramalingam *v.* Koteswara Rao.
10th September, 1948. C. R. P. No. 637 of 1947.

Limitation Act (IX of 1908), *section* 5—*Application to excuse delay in applying for setting aside abatement of suit caused by defendant's death—Absence of knowledge of defendant's death—Sufficient cause for excusing delay.*

The ignorance (as to the death of the defendant) of a person applying for excusing the delay in asking for setting aside the abatement of the suit caused by the defendant's death, constitutes a sufficient cause within the meaning of section 5 of the Limitation Act for excusing the delay in seeking to set aside the abatement.

Decision of Horwill, J., in C. R. P. No. 636 of 1947, dissented from.

If the plaintiff was not aware of the death of the defendant it cannot with reason be contended that he should have made the application earlier or should explain the delay.

The question of excusing the delay and the question whether sufficient cause for excusing delay was made out are essentially within the discretion of the trial Court which cannot be interfered with under section 115 of the Code of Civil Procedure.

M. S. Ramachandra Rao for Petitioner.

M. Appa Rao and *B. Srinivasamurthi* for Respondent.

K.S. ——— *Petition dismissed.*

Panchapakesa Aiyar, J. Choyi *v.* Kaitha Parambath Ayisabi.
13th September, 1948. C. R. P. No. 1273 of 1947.

Malabar Tenancy Act (XIV of 1930), *section* 3 (*v*)—*Person holding land covered by* Karaima *chit on which a petty shop is built as allowed by the chit—Not excluded from benefits of Malabar Tenancy Act and Madras Act XVII of* 1946.

Section 3 (*v*) of the Malabar Tenancy Act clearly says that any person who has paid or has agreed to pay rent or other consideration for his being allowed by another, to enjoy the land of the latter, is a "tenant". It does not say that the enjoyment should be by cultivation or farm house alone. Such a tenant cannot be denied the relief under the Malabar Tenancy Act simply because he chose to construct a shop on the plot and to live in it himself. He is entitled to have a suit for ejectment stayed under Madras Act XVII of 1946.

D. A. Krishna Variar for Petitioner.

K. P. Raman Menon for Respondent.

K.S. ——— *Petition allowed.*

Horwill, J. Arunachala Nadar *v.* Kandaswami Nadar.
14th September, 1948. S. A. No. 180 of 1946.

Civil Procedure Code (V of 1908), *section* 100—*Second appeal—Lower appellate Court reversing decision without considering the large mass of evidence upon which the trial Court relied—Raises a point of law—Jurisdiction to interfere in second appeal.*

The failure of the Subordinate Judge (reversing a decision) to consider the large mass of evidence upon which the District Munsiff relied raises a point of law which gives jurisdiction to the High Court to interfere in second appeal.

J. S. Vedamanickam for Appellant.

S. V. Venugopalachari for Respondent.

K.S. ——— *Appeal allowed.*

Horwill, J. Parameswaran, *In re.*
16th September, 1948. Cr.R.C. No. 679 of 1948.
(Cr.R.P. No. 637 of 1948.)

Madras City Police Act (III of 1888), *sections* 41 *and* 71 (ii)—*Order of Commissioner of Police prohibiting holding of meetings or demonstration in any public place and also promulgation of order under section* 144, *Criminal Procedure Code—Person addressing gathering of workers and causing obstruction to thoroughfare—If can be proceeded against for minor offence under City Police Act.*

Despite the fact that the Commissioner of Police had passed an order prohibiting the holding of any meeting, gathering, procession or demonstration in any public place, and had also promulgated an order under section 144, Criminal Procedure Code, the petitioner disobeyed the orders and addressed a gathering of workers outside the premises of Messrs. Addison & Co., prevented them from going to

their work, and wilfully caused obstruction to the thoroughfare. The petitioner was charged and sentenced under sections 41 and 71 (*ii*) of the City Police Act. On revision it was contended that the petitioner should have been charged under section 188 of the Indian Penal Code with contravening the order promulgated under section 144 of the Criminal Procedure Code.

Held : As only a minor contravention of the law had been committed there is no reason why the police should be forced to make a serious offence of the matter. (1948) 1 M.L.J. 448 distinguished.

It cannot be said that the petitioner was holding a meeting or gathering which would make him liable for the offence under section 41 of the City Police Act. The holding of a meeting or gathering requires something more than speaking. It presupposes some organising and the making of arrangements to gather persons together in order that the meeting or gathering might be held. But the petitioner's conviction for the offence under section 71 (*ii*) of the City Police Act was correct as he was causing obstruction in the road or pavement.

C. R. Pattabhiraman and *R. Ramasubba Aiyar* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for Crown Prosecutor on behalf of the Crown.

K.S. ——— *Petition allowed in part.*

Rajagopalan, J. Muhammad Ibrahim Maricar *v.* Ahmed Maricar.
16th September, 1948. C. R. P. No. 1444 of 1947.

Civil Procedure Code (V of 1908), Order 6—Additional written statement—Plea inconsistent with pleas already set out in original written statement—If can be allowed to be raised.

Where the plea in a proposed additional written statement was that the defendant's father was a partner with the plaintiff whereas in the original written statement the defence raised was that the defendant himself was the partner of the plaintiff (who sued as the sole owner of a business) there is no legal bar to consider the plea even if it is inconsistent with the original plea. 32 L.W. 61, relied on.

If both the pleas had been put forward in the written statement as originally filed, that would have been permissible and the Court would have been called upon to investigate both the pleas, despite the fact that they were inconsistent pleas. The only question to consider, when an apparently inconsistent plea is put forward in an additional written statement is, whether it is expedient with reference to the circumstances of the case to permit such a plea being put forward at that stage. When the additional statement is sought to be filed at a late stage, if the delay can be adequately compensated by award of costs, the defendant can be permitted to file the additional written statement.

K. E. Rajagopalachari for Petitioner.

K. C. Subramaniam Chettiar for Respondent.

K.S. ——— *Petition allowed.*

Horwill, J. Selathu and others, *In re.*
17th September, 1948. Cr. R. C. No. 790 of 1948.
(Cr. R. P. No. 745 of 1948).

Penal Code (XLV of 1860), section 506—Threat of social boycott if certain persons continued to work as agricultural labourers for their masters with whom the other labourers were trying to secure better terms—If offence punishable under section 506, Penal Code.

Where some agricultural labourers were trying to improve their lot by bargaining with the mirasdars to obtain better conditions and trying to persuade their fellow labourers not to work until they had secured better terms, they are entitled to enforce social boycott against those who decided to work. It would not amount to an injury within the meaning of section 44, Penal Code. 1933 M.W.N. 736, relied on.

It is difficult to see how it can be illegal to ask the barber and washermannot to shave or wash the clothes of those who refuse to help in securing better conditions of agricultural service. Accordingly a threat of social boycott is not an offence punishable under section 506 of the Indian Penal Code.

C. R. Pattabhiraman and *R. Ramasubbier* for Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S. ——— *Conviction set aside.*

Panchapakesa Aiyar, J. Ramachandra Naidu *v.* Kandaswami Mudaliar.

10th September, 1948. C. R. P. No. 1518 of 1947.

Civil Procedure Code (V of 1908), *section* 80—*Notice under—Requirements.*

Where a notice under section 80 of the Code of Civil Procedure has to be given it must be strictly in conformity with the provisions of section 80 without any material alteration of the juridical capacity of the person suing, or the relief claimed or the other incidental circumstances. A notice issued by a person in his own name cannot be said to be the same as a notice issued by that person as the manager of a Hindu joint family, for purposes of section 80 whatever weight it may have in a decree in a suit.

D. Munikanniah for Petitioner.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondent.

K.S. ——— *Petition dismissed.*

Rajagopalan, J. Alaga Pillai *v.* Doraiswami Pillai.

15th September, 1948. C. R. P. No. 710 of 1948.

Madras Hindu Religious Endowments Act (II of 1927), *section* 79-A—*Scope—Order under section* 42—*Application to set aside—When lies.*

If the basis of the appointment ordered under section 42 of the Madras Hindu Religious Endowment Act was contrary to the usage of the institution within the meaning of section 79, the validity of that order could be challenged on that ground and if a " dispute " arose as to the usage upon which the validity or invalidity of the order passed under section 42 depended, that dispute would be within the scope of clause (1) of section 79-A. Once there is a decision under that clause, section 79-A, clause (3) would come into play and an application to set aside such an order of the Board would be competent.

A. V. Viswanatha Sastri, K. R. Krishnaswami Aiyar and *S. P. Subramaniam* for Petitioner.

T. A. Ramaswami Reddi, N. Somasundaram and *M. Chockalingam* for Respondent.

K.S. ———

Horwill, J. Thimmappa *v.* Balayya.

17th September, 1948. A. A. O. Nos. 439, etc. of 1946

Provincial Insolvency Act (V of 1920), *section* 43—*Annulment of adjudication and property ordered to continue to vest in Official Receiver—Alienation by insolvent set aside in the meantime—Alienees depositing sufficient money to pay all creditors—Insolvent also depositing sufficient money to pay off creditors and the alienees—Person entitled to the property under the set aside alienation.*

On 22nd June, 1937, *B*, then in insolvent circumstances alienated his property in favour of *N* and others. On 13th August, 1938, the alienee sold some of the property to *R* and on 10th August, 1944, *R* transferred some of his rights to *T*. *B* was adjudicated insolvent on 8th March, 1938. At the instance of the Official Receiver the alienations of 22nd June, 1937, and the consequent alienations were set aside. On 9th February, 1940, the adjudication was annulled under section 43 of the Provincial Insolvency Act ; but the property was ordered to continue to vest in the Official Receiver. Subsequently the alienees deposited in Court a sufficient sum of money to pay off all the creditors and asked that the property be delivered

to them. The insolvent also subsequently deposited money sufficient to pay off the creditors as well and to pay the alienees what was due to them under the deed of 22nd June, 1937.

On a question whether *B*, the insolvent or his alienees were entitled to the properties,

Held, the alienee should be given possession of the property since it was not necessary to sell them for meeting the debts of the creditors despite the fact that the alienation had to be set aside in its entirety. The insolvent should be allowed to withdraw the amount deposited by him.

An insolvency Court administers the assets of the insolvent in equity for the benefit of the creditors and restores it to the person to whom it is properly due, if the claims of the creditors do not necessitate the sale of the property.

Ch. Raghava Rao for Appellant.

P. Chandra Reddi, O. Chinnappa Reddi, A. Bhujanga Rao, D. R. Krishna Rao and *C. Kondiah* for Respondent.

K.S. ——————

Horwill, J.
17th September, 1948.

Dhanaraju, *In re*
Cr. R. C. No. 624 of 1948.
(Case Referred No. 36 of 1948).

Criminal Procedure Code (*V of* 1898), *section* 438—*Sub-Divisional Magistrate disagreeing with trial Magistrate who convicts the accused—Reference to High Court when accused has right of appeal—Desirability.*

The accused was convicted and the papers sent to the Sub-Divisional Magistrate for action under section 562, Criminal Procedure Code, who thought that the evidence was not sufficient to warrant the conviction of the accused and so sent the papers to the District Magistrate, asking him to refer the matter to the High Court to have the conviction set aside. The District Magistrate referred it to the High Court.

Held, that references of this kind are not desirable, merely because the Sub Divisional Magistrate disagrees with the trial Magistrate, especially as the accused has a right of appeal if he feels that he has been wrongly convicted.

1940 M.W.N. 44, approved.

[In the present case however it was found that there was insufficient evidence to support the conviction and the conviction was set aside.]

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

Accused not appearing in person or by advocate.

K.S. —————— *Reference accepted.*

Panchapakesa Aiyar, J.
17th September, 1948.

Venkatasubramanya Sastri *v.* Gopalaswami Reddi.
S. A. No. 244 of 1946.

Madras Estates Land Act (*I of* 1908), *section* 120—*Sale of lots in order different to the one specified in proclamation—Legality.*

There are two mandatory provisions in section 120 of the Madras Estates Land Act, namely, that the selling officer shall sell the lots as specified in the proclamation of sale under section 116 (2) of the Act and that he shall immediately stop the sale of the remaining items the moment the amount of the decree is realised. A sale of the lots not in the order specified will be illegal and must be set aside.

It will be highly dangerous to allow selling officers to alter the order of sale as they please without an order of Court, or a request by the judgment-debtor to the Court, or because of lack of bidders for the intervening items or other sufficient reason. Even if the selling officer acted from mere whim or caprice, or even with the best of intentions, it will not matter at all in the case of a violation of the mandatory provisions of law like section 120 of the Madras Estates Land Act. Sales vitiated by their departure from the mandatory provisions of section 120 will be null and void and as if they were not.

M. E. Rajagopalachari for Appellant.

V. V. Raghavan and *K. N. Narasinga Rao* for Respondent.

K.S. *Appeal dismissed. Leave to appeal granted.*

Panchapakesa Aiyar, J. Shanmugha Mudaliar *v.* Bangaru.

17th September, 1948. C. R. P. No. 1038 of 1947.

Penal Code (XLV of 1860), *section* 471—*Order directing prosecution for using mortgage deed with an alleged forged endorsement as genuine—When proper.*

A prosecution under section 471 of the Penal Code regarding the using of a mortgage deed with an alleged forged endorsement on it as genuine cannot be directed to proceed when the order for prosecution of the accused under section 465 of the Penal Code for forging such endorsement is set aside. Any prosecution in such a matter at public expense ought to be justified by two considerations, namely, that there is a reasonable chance of conviction and that it is expedient in public interests to launch a prosecution, obviously because public moneys are spent on such prosecutions.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the crown.

V. V. Raghavan and *V. R. Doraiswami* for Respondents.

K.S.

Panchapakesa Aiyar, J. Subramanyam *v.* Lakshmi Naranamma.

17th September, 1948. C. R. P. No. 1294 of 1947.

Court-fee and jurisdiction—Agricultural land—Income for "year" before the filing of plaint—Computation—If to be for "revenue year" or "calendar year"—Definition of "year" in General Clauses Act—If applicable—Question of valuation.—Revision—If lies.

In a suit relating to agricultural land the income for the "year" before the filing of plaint for purposes of court-fee and jurisdiction is to be computed for the revenue or the agricultural cultivation year and not the calender year. It can be taken as the calender "year" according to the General Clauses Act only if there is nothing else in the context to guide the Court. When the matter involves a question of jurisdiction of the lower Court and not one affecting court-fee alone, a revision lies to the High Court.

N. Suryanarayana for Petitioner.

E. Vinayaka Rao for Respondent.

K.S. *Petition dismissed.*

Subba Rao, J. Mohammad Sheriff, *In re.*

23rd September, 1948. Cr. R. C. Nos. 915 and 916 of 1947.

(Cr. R. P. Nos. 814 and 815 of 1947).

Motor Vehicles Act (IV of 1939), *section* 42 (1) *read with section* 123—*Permit to use lorry for carrying "vegetables and food grains only on behalf of the military"—Use of vehicle for carriage of red earth for repairs to owner's factory—If contravention of permit.*

Where a permit for use of a lorry stated the nature of the goods to be carried to be "vegetables and food grains only on behalf of the military" and the owner and driver were prosecuted for contravention of the conditions in the permit by carrying red earth for repairs to the factory of the owner,

Held : That the carriage of such earth was for or in connection with the business of the owner and the accused were not guilty. From the use of the word "only" it cannot be implied that the permit holder is precluded from using it for his own purpose for which he would otherwise be entitled to use under proviso 3 to section 42 (1).

V. Rajagopalachari for *T. A. Rajagopalan* and *R. V. Raghavan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

K.S. ——— *Convictions set aside.*

Mack, J. Mannil *v.* Kesava Tharagan.

24th September, 1948. C.R.P. No. 1372 of 1947.

Madras Tenants and Ryots Protection Act (XVII of 1946)*—Stay under—Necessity to pay rent for succeeding years within two months of the rent falling due—Tenant holding over after expiry of very old lease—Due date—If to be decided by looking at old lease deed.*

Where there was an old lease providing for payment of rent in two instalments of 3/5th and 2/5th in the months of Kanni and Makaram respectively, but the tenant who was in occupation merely holding over under section 116 of the Transfer of Property Act has voluntarily paid the whole rent of the year in one instalment within two months of the expiry of Makaram and several months before the expiry of the Malayalam year it is not necessary to apply the terms of the old lease strictly (though the local practice is to pay in two instalments in Kanni and Makaram) and deprive the tenant of his right to have the proceeding for bringing the holding to sale, stayed under Madras Act XVII of 1946.

S. Venkatachala Sastri and *N. Sundara Aiyar* for petitioner.

D. A. Krishna Variar for Respondent.

K.S. ——— *Petition allowed.*

Subba Rao, J. Narasingadu, *In re.*

24th September, 1948. Cr.R.C. Nos. 582, etc. of 1947.

(Cr.R.P. Nos. 478, etc. of 1947).

Penal Code (XLV of 1860), *section*-193*—Persons giving statements under section* 164, *Criminal Procedure Code—Denial of the story in preliminary enquiry—Complaint under section* 193, *Penal Code—Propriety.*

To prosecute a man who has resiled from a false statement made under section 164, Criminal Procedure Code is to encourge him in the belief that it pays to tell a lie and stick to it. It is far better that a man should escape punishment for having made a false statement under section 164 than that he should be induced to believe that it is to his interest, however false the statement may have been to adhere to it and thereby save himself from prosecution. The danger of such a course leading to the conviction of innocent persons is too great to be risked. Such prosecutions would not be in the interests of justice.

1942 I.L.R. Bom. 26 followed.

N. Somasundaram for *C. Kondiah* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Revision allowed.*

Panchapakesa Aiyar, J. Nachimuthu Goundan *v.* Sivaramasundara Gurukkal.
13th September, 1948. S. A. No. 188 of 1946.

Inam—Malaikatti (*garland*) *inam—Land described as sarvamanyam and granted free from all taxes—Finding that both warams were granted supported by evidence—Not open to interference in second appeal—Finding that section* 44 (b) *of the Madras Hindu Religious Endowments Act is retrospective—If can be attacked in second appeal.*

Where in a *malaikatti* (garland) inam the description of the lands granted as sarvamanyam, is though not conclusive, more than half conclusive that both the warams were granted and not merely the melwaram The further circumstance that the documents described the grant as of "land free from all taxes" shows that the land also was granted and not merely the tax. A finding on evidence that both warams were granted as well as a finding that section 44 (*b*) of the Madras Hindu Religious Endowments Act had retrospective cannot amount to an error of law to warrant interference by the High Court on second appeal.

V. Seshadri and *K. S. Ramamurthi* for Appellant.

R. Ramamurti Aiyar and *S. Srinivasan* for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Horwill, J. Simhagiri Dora *v.* Zemindarini of Chemudu.
13th September, 1948. C. R. P. No. 260 of 1947.

Civil Procedure Code (*V of* 1908), *section* 115—*Amendment of decretal portion of judgment to bring it into conformity with earlier parts of judgment and consequent amendment of decree—Revision if lies.*

Where the lower Court amended what is often described as the decretal part of the judgment to bring it into conformity with the earlier parts of the judgment and thereupon amended the decree to bring it into conformity with the amended judgment no civil revision petition lies against the order of amendment especially as an alternative remedy is available. (Case-law discussed.)

B. V. Subramanyam for Petitioner.

K. Umamaheswaram for Respondent.

K.S. ——— *Petition dismissed*

Horwill, J. Madura Sri Meenakshi Sundareswaral, etc., Devasthanam
14th September, 1948. *v.* Sellathayee.
S. A. No. 52 of 1946.

Madras Estates Land Act (*I of* 1908), *section* 26 (3)—*Trustee landholder—If can claim that he is not bound by any remission granted by his predecessor—Section* 24—*Effect.*

A landholder according to section 3 (5) of the Madras Estates Land Act includes " every person entitled to collect the rents of the estate by virtue of any provision of law." A trustee is therefore a landholder and whenever there is a change of trustee there is technically a change of landholder ; so that a succeeding trustee has a right to invoke section 26 (3) of the Estates Land Act and to claim that he is not bound by any remission granted by his predecessor. The provisions of section 24 prohibiting enhancement of rent, do not apply to cases where a right to remission does not continue.

K. Kuttikrishna Menon and *K. Veeraswami* for Appellant.

K. S. Desikan for Respondent.

K.S. ——— *Appeal allowed.*

Rajamannar, C.J. and Panchapakesa Aiyar, J. Tirumalai Tirupathi
20th September, 1948. Devasthanams *v.* Seshachalam Dikshitulu.
S. A. Nos. 2221 and 2222 of 1945
and Transferred App. No. 159 of 1947.

Religious endowments—Temples—Devasthanam Committee collecting fee for archanas *from worshippers—Right of* archakas *and other servants to such fees as additional remuneration.*

When the temple authorities collect a particular fee for the performance of an *archana* for individual worshippers, they are as it were collecting on behalf of the *archakas* and other servants who perform the necessary functions in this matter,

the remuneration due to them. Such *archakas* are entitled to demand an account of that part of the ticket fees which may be said to represent their remuneration for the services performed by them. No question of master and servant and the duty of a servant to do a little extra amount of work in the usual course of things without a corresponding right to increased wages arises. As performance of *archanas* for individual worshippers by *archakas* lies outside the scope of the ritual of the *archana* which is to be performed by the *archakas*, they are not precluded from making a claim for part of the amount collected as ticket fees by the committee.

P. Chandra Reddi, K. Venkataratnam and *O. Chinnappa Reddi* for Appellant.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondents.

K.S. *Appeals and memoranda of Objections dismissed.*

Subba Rao, J. Subbaroya Padayachi *v.* Kozhandaivel Udayar.
22nd September, 1948. C.R.P. No. 1054 of 1947.

Civil Procedure Code (V of 1908), Order 16, rule 19 (b)—Expert witness—Right of party to examine on commission.

A party to a suit has a right to ask for the issue of a commission to examine a witness beyond the prescribed distance. The same principle applies even in the case of an expert witness. A party can ask for a commission to examine a handwriting expert of his choice as a matter of right.

Accordingly where in a suit on a promissory note the defendant who contends that the endorsement was a forgery applies for the issue of a commission to examine Mr. Dixit, Government Examiner of questioned documents, Central Provinces and Berar, it is not open to the Court to dismiss the application on the ground that it was desirable that the suit document should be examined by the Government Examiner of the Central Government.

When a petitioner is entitled to select his own witnesses and he selects one of the two witnesses that are available, it cannot be said that he is guilty of an abuse of the process of Court.

26 M.L.J. 889 (890) and I.L.R. 46 Mad. 574, relied on.

Observations in (1946) 1 M.L.J. 179 that " it is a matter of discretion for the Court in the circumstances of each particular case " to issue a commission, treated as mere *obiter* and not followed.

T. E. Rumabhadrachari for Petitioner.

S. Krishnamachari for Respondent.

K.S. *Petition allowed.*

Govinda Menon and Mack, JJ. Kesanna *v.* Venkamma.
24th September, 1948. A.A.O. No. 688 of 1945.

Arbitration—Taking evidence of one party behind the back of the other—Effect on award—Recording mere statement of party's claim if recording evidence.

It is well settled law that an arbitrator should not hear the evidence of one party behind the back of the other. An arbitrator who records evidence on behalf of either party behind the back of the other must be held to misconduct the proceedings. By merely taking down the statements from the parties in which they merely reiterated the request contained in their petition for arbitration that the arbitrator should give his award on the basis of the pleadings it cannot be said that any evidence was recorded from one party behind the other party and to the latter's prejudice. No hard and fast rule can be laid down as to what precisely constitutes misconduct either of the arbitrator or of the arbitration proceedings. This must depend upon the circumstances of each case.

P. Chandra Reddi and *O. Chinnappa Reddi* for Appellant.

M. S. Ramachandra Rao for Respondent.

K.S. *Appeal allowed.*

Horwill, J. The Corporation of Madras *v.* The Scindia
7th September, 1948. Steam Navigation Co., Ltd.
C.C.C.A. No. 16 of 1947.

Madras City Municipal Act (IV of 1919), *section* 401—*Company assessed to tax under section* 110 *on the basis of company's return of gross income—Company subsequently drawing attention of the Commissioner to the fact that figure given was incorrect—If renders assessment already made illegal—Civil Court—If can interfere where remedy under statute not availed of.*

Section 401 of the City Municipal Act substantially lays down the recognised law as to the circumstances under which a Civil Court can intervene when remedies are afforded in the statute itself to a person aggrieved by any act done or order passed against him under that statute. Where the Corporation has assessed a company to tax under section 110 of the City Municipal Act on the basis of the company's return of its gross income the Corporation acts in accordance with the rules. The fact that subsequently the company drew the attention of the Commissioner to the fact that the figures on which the calculations had been made was not the correct one does not render the assessment already made *bona fide* by the Corporation an illegal one. The company could have deposited the tax assessed and asked the Commissioner to set aside the assessment. Where that was not done and no further steps were adopted by the company by way of appeal to the Taxation Appeals Committee and therefrom to the Court of Small Causes no suit for declaration that the amount to which the company was assessed was not legally payable by it.

P. Chenchiah for *John and Row* for Appellant.
V. Rajagopala Mudaliar for Respondent.

K.S. *Appeal allowed.*

Horwill, J. The Indo Commercial Bank, Ltd., Madras *v.*
10th September, 1948. The Corporation of Madras.
C.C.C.A. No. 40 of 1947.

Madras City Municipal Act (IV of 1919), *section* 110—*Power to levy tax on companies under—If affected by Professions Tax Limitation Act (XX of* 1941 *as amended by Act V of* 1946),—*Government of India Act, section* 142-*A introduced in* 1940—*Effect.*

A reading of Government of India Act, section 142-A (introduced in 1940), and of section 2 of the Professions Tax Limitation Act, 1941 (XX of 1941) shows that they are intended to hit at taxes such as are leviable under section 111 of the City Municipal Act, which enables a Municipal Council to levy a tax on any person or company which " exercises a profession, art or calling or transacts business or holds any appointment, public or private " and not to affect in any way the right of the municipality to levy a tax under section 110 of the City Municipal Act. Act V of 1946 was introduced by way of abundant caution to remove any doubt that might have existed, and even without it the municipality would have had the right to levy taxes under section 110. In any event the 1946 Act was given retrospective effect to the date of Act XX of 1941 thus eliminating the interval between the two Acts. The two Acts operated together from 1st April, 1942. Assessment of tax on a company under section 110, City Municipal Act, from 1st April, 1942, is therefore proper.

T. M. Kasturi and *G. Vasanta Pai* for Appellant.
K. C. Subramania Chettiar for *John and Row* for Respondent.

K.S. *Appeal dismissed.*

Panchapakesa Aiyar, J. Velu Chettiar *v.* Ranganatham Chettiar.
24th September, 1948. C.R.P. No. 1286 of 1946.

Practice—Findings at variance with pleadings—When permissible—Suit for recovery of amount recited as paid as consideration for assignment of decree for money but not paid—Plea of defendant that he had paid the consideration—Court if can find that assignment of decree was for collection.

There may be cases where the Court has to ignore the lies on both sides and to arrive at the truth, as when, for instance, interested parties make themselves

plaintiff and defendant in a suit in respect of some Government properties and freely admit the claims of one or the other to portions thereof. But the proper course even there will be for the Court to implead the Government, or other party vitally interested in the matter, under Order 1, rule 10, Civil Procedure Code, by giving notice to them, and get the pleadings and issues necessary to expose the lies on both sides and to arrive at the truth.

Where however the plaintiff claimed that cash recited as paid for the assignment of a decree by him to the defendant was not paid and sought to recover the amount and the defendant's plea was that cash was paid by him subsequent to the assignment and he did not contend that the assignment was only for collection. it is wrong in law to find that the assignment was for collection. Once the Court finds that the amount had not been paid by the defendant the proper course is to pass a decree in favour of the plaintiff for the amount claimed . Nor can the Court find that there was a failure of consideration by reason of the scaling down of the decree assigned in respect of which nothing but some small amount for costs was recovered.

M. E. Rajagopalachari for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

K.S. —— *Petition allowed.*

Rajagopalan, J.
29th September, 1948.

Appa Rao, *In re.*
Cr.R.C. No. 877 of 1948.
Cr.R.P. No. 826 of 1948.

Madras General Sales Tax Act (IX of 1939), *sections* 15 (b) *and* 16-*A (as amended by Act XXV of* 1947)—*Failure to pay tax due under law as it stood before amendment—Prosecution—Sustainability—Validity of assessment—If can be gone into by the Court.*

The offence with which the petitioner was charged was failure to pay the tax due under the law as it stood before the complaint was lodged on 4th May, 1947. The amended section 15 (*b*) made punishable the failure to pay the tax *assessed,* not failure to pay the tax due. In the absence of any provision in the Amending Act to make that definition as amended in section 15 (*b*) applicable to acts committed prior to that enactment, the Court will have to investigate whether the accused was guilty of the offence with which he was charged, *i.e.*, failure to pay the tax *due* under section 15 (*b*). of the Act as it stood before it was amended. The expression " due " can only be interpreted to mean " lawfully due." Section 16-A cannot be construed independently of the amended section 15 (*b*) both of which came into effect on 1st January, 1948, long after the alleged commission of the offence with which the petitioner (accused) was charged.

As the Magistrate has to consider in the present case whether the offence with which the accused was charged, viz. failure to pay the tax due, was committed, it is fully open to the accused to prove that the tax was not lawfully due and that no offence was thereby committed. It cannot be said that section 16-A barred the investigation of the validity of the tax assessed.

Decision of Govinda Menon, J. in Cr.R.C. 183 of 1947 considered and not followed.

Decision of Rajamannar, J., in Cr.R.C. Nos. 1257, 1258 and 1259 of 1946 relied on.

N. Subramaniam for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. —— *Petition allowed.*

Panchapakesa Sastry, J.
1st October, 1948.

Srinivasachari *v.* Rukmani Ammal.
C.R.P. No. 796 of 1948.

Madras Hindu Religious Endowments Act (II of 1927), *section* 58, *clause* (2)—*Hereditary office of archaka—Succession to by female—Sex if " physical infirmity " within the meaning of proviso to section* 58 (2) *giving the trustees a right to fill up the office themselves.*

The proviso to section 58, clause (2) of the Madras Hindu Religious Endowments Act contemplates only certain specified contingencies where there is a temporary vacancy in the office (of Archaka in this case,) either because of a dispute relating to succession or the person succeeding is a minor without a guardian or where the hereditary office-holder or servant is by reason of unsoundness of mind or other physical infirmity unable to discharge the functions of the office or perform the service. The Legislature did not intend to alter the law of succession to hereditary offices by depriving the females of the hitherto recognised right of succession. It will be unduly straining the meaning of the expression " physical infirmity " if it is allowed to take in the female sex of the office-holder entitled to succeed to the office. Both mental and physical infirmities are taken as bodily infirmities but female sex cannot be described as an infirmity at all. The trustees cannot claim a right to " appoint a fit person " to discharge the duties of the archaka office on the ground that the holder of the office is a female who must be taken to be unable to perform the services by reason of her sex which must be deemed to be a " physical infirmity."

A. V. Viswanatha Sastry for *S. Ramachandra Aiyar* for Petitioner.

K. E. Rajagopalachari for Respondents.

K.S. ——— *Petition dismissed.*

Govinda Menon, J. Natesan and others, *In re.*

1st October, 1948. Cr.M.P. Nos. 1416 etc. of 1948.

Company—Banking company—Auditor and directors—When liable to criminal prosecution for signing balance sheets—Companies Act (VII of 1913), *sections* 132, 145, *and* 282.

What ought to be the contents of a balance sheet of a company is statutorily found in section 132 of the Indian Companies Act. The duties of an auditor with respect to the scrutiny of the accounts, etc., of the company are also defined in section 145 of the Companies Act. Unless there are false statements in the balance sheets of material particulars wilfully made by the auditor and the directors knowing them to be false they cannot be held guilty of an offence under section 282 of the Companies Act. The duty of an auditor is verification and not detection. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. He must of course take care that he does not bring into the balance sheet at face value a debt that is not a good one.

One cannot attribute any wilful negligence or dishonesty to directors who are men of position and responsibility if they depend upon and trust the permanent officials and the managing director of the company so far as working of the company is concerned in signing the balance sheets. Unless the prosecution shows *mala fides* or want of good faith on the part of the directors or auditors they cannot be held to be criminally liable.

V. Rajagopalachari, K. V. Ramachandra Aiyar, K.S. Champakesa Ayyangar, K.S. Desikan and *N. Rajagopala Ayyangar* for the Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S. ——— *Charges quashed and accused discharged.*

Subba Rao and Mack, JJ. Public Prosecutor, Madras *v.* Nagappa Pujary.

5th October, 1948. Cr.A. No. 453 of 1948.

Madras Borstal Schools Act (V of 1926), *section* 8—*Scope and applicability—" Criminal tendency "—Interpretation—Conviction of adolescent for causing grievous hurt under provocation—Sending to Borstal Schools—Propriety.*

Per *Subba Rao J.*—The condition precedent to the application of section 8 of the Madras Borstal Schools Act is that the adolescent offender should have criminal habits or tendencies or association with persons of bad character. The words " criminal tendencies " should not be given a narrow interpretation. Whenever an adolescent is convicted of an offence, ordinarily, he should be given

the advantage of being put in the Borstal School so that by long association and training he would come out after the termination of the stay as a useful citizen of the country. It cannot be said that a person convicted of an offence punishable under section 335 of the Penal Code for beating the deceased under provocation and in the heat of passion cannot have section 8 of the Borstal Schools Act applied to him as there was no criminal tendency.

Per *Mack, J.*—A criminal tendency does not manifest itself only in the acts involving dishonesty such as theft, or cheating. A person who, owing to lack of self-control or as the result of his environment, is unable to restrain himself and commits an offence of either grievous hurt or homicide by using a deadly weapon without regard to consequencs exhibits a criminal tendency just as much as a person who steals. There can be no case in which an adolescent should be sent for a long period to an ordinary jail in which he cannot with better advantage to himself and the community at large be sent to a Borstal institution. The scope of the Act should not be narrowed down to adolescents who have been shown to have previous criminal tendencies or bad association.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

Md. Habibullah amicus curiae for the Accused.

K.S. ——— *Sentence on first accused modified.*

Subba Rao, J. Angamuthu and others, *In re.*
7th October, 1948. Cr.R.C. No. 615 of 1948.
(Cr.R.P. No. 578 of 1948).

Madras City Police Act (III of 1888), *section* 75—*Gist of offence under—Persons charged with disorderly behaviour—If should be drunken also to warrant a conviction under section* 75.

Under section 75 of the Madras City Police Act being " guilty of any riotous, disorderly or indecent behaviour," is a separate offence and it is not necessary that such persons are also drunk and incapable of taking care of themselves to warrant a conviction for an offence under that section.

(1944) 2 M.L.J. 322 followed though doubted.

B. T. Sundararajan and *S. Krishnamurthi* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) as Crown Prosecutor on behalf of the Crown.

K.S. ——— *Sentences reduced and petition dismissed.*

Panchapakesa Aiyar, J. Kotaiah *v.* Narasimham.
7th October, 1948. C.R.P. No. 1466 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 13—*Order allowing petition for setting aside* ex parte *decree on condition that the petitioner deposited costs of suit and day costs by a fixed day and in default of payment petition to stand dismissed automatically*—" *Final order*" *for limitation for appeal.*

Where an order is made allowing a petition to set aside an *ex parte* decree on condition that the petitioner deposited costs of the suit and day costs before a fixed day and " in default of one or other of the two conditions the petition stands dismissed " automatically and the cost of suit were not paid in time and the petition was dismissed, that order is a " final order " for purposes of filing an appeal and such appeal must be filed within 30 days of the order.

I.L.R. 1945 Mad. 203, relied on.

1917 M.W.N. 815 and A.I.R. 1925 Mad. 1182, not followed.

B. V. Ramanarasu for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S. ——— *Petition dismissed.*

Rajagopalan, J.
16th September, 1948.

Devarasetti Thavudu *v.* Jami Appa Rao.
S. A. No. 250 of 1946.

Registration Act (*XVI of* 1908), *section* 17—*Family arrangement reduced to writing of more than Rs.* 100 *value—Document not registered—Inadmissible in evidence.*

Though a family arrangement could be made orally, if it was in fact reduced to the form of a document, registration is necessary when the value is Rs. 100 and upwards. Such document if unregistered is inadmissible in evidence.

I.L.R. 51 All. 79 and I.L.R. 1937 All. 817 (F.B.), relied on.

C. V. Dikshitulu for Appellant.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondent.

K.S.

Decree modified. Leave to appeal refused.

Horwill and *Govinda Menon, JJ.*
1st October, 1948.

Rangaraju Pillai *v.* Sakuntala Ammal.
O. S. No. 14 of 1948.

Madras High Court Original Side Rules, Order 34, *rule* 55—*Citation not delivered to the sheriff within the* 14 *days allowed under the rule—Power of Court to excuse delay—Notice to party entering the caveat not essential.*

Notice is not necessary to the opposite party of an application (by a person who had filed a probate application) for excusing the delay in taking out a citation to the opposite party filing caveat. By the delay the person entering caveat acquired no vested rights ; and he was not even a party to the proceedings at that stage. At that stage therefore the question of delay was one between the applicant for grant of probate and the Court.

D. A. S. Swami for Appellant.

S. V. B Rao and *K. Srinivasan* for Respondent.

K.S.

Appeal dismissed.

Mack, J.
1st October, 1948.

Marimuthu Pillai *v.* Anantha Narayanaswami Pillai.
C. R. P. No. 935 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 17—*Amendment of plaint seeking to raise legal plea of* lis pendens—*Application for—Cannot be rejected as belated.*

Where an amendment sought by a plaintiff seeks to raise a legal issue that the defendants are barred by the doctrine of *lis pendens* from contending that certain transfers to the plaintiff were benami and nominal, being legal issues they can be raised at any time and the amendment cannot be disallowed on the ground that the amendment petition was belated.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Petitioner.

T. K. Rajagopala Aiyangar for Respondent.

K.S.

Petition allowed.

Govinda Menon and *Mack, JJ.*
6th October, 1948.

Thathayya *v.* Venkatapeddiraju.
A. A. O. No. 609 of 1947.

Mortgage—Mortgagor purchasing property in execution of decree on first mortgage—Liability for second mortgage.

A mortgagor purchasing the property in execution of a mortgage decree made in the suit of a prior mortgagee in which the mortgagor and the second mortgagee were made defendants and given an opportunity to redeem the prior mortgage acquires the property subject to the second mortgage. It may be that ordinarily when a first mortgagee brings a suit impleading the second mortgagee and a decree is obtained, the remedy open to the second mortgagee is only to redeem the first mortgage or to share in the sale proceeds when the property sold on the first mortgage is made free from the second mortgage. In such a case the second mortgage gets extinguished. But the position is entirely different when there has already been a decree on the second mortgage capable of being executed and the mortgagor ultimately becomes the owner of the property by purchase or otherwise. The situation is exactly as if the mortgagor had paid off the first mortgagee. A

mortgaged property in the hands of the mortgagor is always liable on the mortgage claim whatever transactions had taken place during the intervening period. (Case-law discussed).

P. M. Srinivasa Aiyangar for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S. ——— *Appeal dismissed.*

Satyanarayana Rao, J. Damodara Menon *v.* Chathu Achan.
6th October, 1948. C. R. P. No. 1727 of 1947.

Madras Marumakkathayam Act (XXII of 1933 as amended by Act XXXII of 1947), section 4—One of the parties to marriage not alive on date when Act came into force—Children of union if legitimate for purposes of succession.

Under the Marumakkathayam Law before it was altered by the statute the children of Marumakkathayam marriage were not treated as legitimate. To remedy this, Madras Act XXII of 1933 was passed. Under section 4 of that Act the union between the parents governed by the Marumakkathayam Law was legalised subject to the conditions laid down in that section. One of the requisites under that section was that the union should have been openly solemnized in accordance with the customary ceremonies if any, prevailing in the community to which the parties belong or either of them belongs before the date on which the Act came into force and was subsisting on such date. In (1946) 2 M.L.J. 135, affirming (1945) 2 M.L.J. 15, it was held that if on the date when the Act came into force one of the parties to the union was dead, there being no subsisting marriage on that date the marriage could not be legalised and therefore the children of the union were to be treated as illegitimate for purposes of succession. As a result of agitation against that position by the public, Madras Act XXXII of 1947 was passed and *inter alia* the expression " and is subsisting on such date " occurring in section 4, sub-section (1) clauses (*b*) (*i*) and (*b*) (*iii*) were omitted, and the provisions of the Amending Act were expressly made retrospective. Accordingly the decision in (1946) 2 M.L.J. 135 (*Janaki Amma* v. *Raman Nayar*), is no longer good law and notwithstanding the fact that their mother died before 1932 when the Marumakkathayam Act came into force and there was no subsisting marriage between the parents on that date the children of such union are legitimate and on the death of their father are entitled to be brought on record as his legal representatives.

N. Gopala Menon for Petitioner.

Respondent not represented.

K.S. ——— *Petition allowed.*

Rajagopalan, J. Vedamuthu Nadar, *In re.*
6th October, 1948. S. R. No. 29360 of 1948.

Criminal Procedure Code (V of 1898), sections 435 and 439 and Letters Patent (Madras), clause 27—Order of Court of Village Magistrate—Revision against in the High Court—Maintainability.

A revision petition against the order of the Court of a Village Magistrate is not maintainable. Neither the provisions of Regulation XI of 1816 nor the provisions of the Criminal Procedure Code give any jurisdiction to the High Court to interfere in revision. The provisions of the Letters Patent, clause 27, are not applicable either. Even assuming that a fraud on justice has been perpetrated the High Court cannot intervene at that stage.

M. C. Sridharan for Petitioner.

K.S. ——— *Petition rejected.*

Rajamannar, C.J. and *Panchapakesa Aiyar, J.* Kamalamma *v.* Pichamma.
7th October, 1948. S. A. No. 268 of 1946.

Co-sharers—One co-sharer in exclusive possession of joint land in excess of his share—Liability to pay compensation to the other co-sharers.

A co-sharer in possession of joint land in excess of his share is liable to pay compensation to the other co-sharers for his exclusive use and benefit of the common

land, although the other co-sharers are not entitled in the absence of an ouster to an account of the profits or to a share therein from the co-sharer in occupation of the common land. Case-law discussed.

Konda Kotiah and *C. V. Narasimha Rao* for Appellants.

P. Chandra Reddy, O. Chinnappa Reddi and *R. Rajagopala Aiyar* for Respondent.

K.S. ——— *Appeal allowed in part.*

Mack, J. Venkamma *v.* Venkataramayya.
7th October, 1948. C. R. P. No. 1373 of 1947.

Court-fee and jurisdiction—Valuation of suit—Suit for declaration (1) *that plaintiff was nearest reversioner of a Hindu,* (2) *that an alleged will by him in favour of his widow was not valid and* (3) *that an alienation of some property by the widow was not binding on plaintiff—Valuation for court-fee and jurisdiction.*

Under cover of a very small alienation of property by a Hindu widow whose life estate comprises very substantial property it is not open to a reversioner to seek to have his rights declared—even though they only amount to a *spes successionis* which may never be realised—and a will bequeathing considerable property to the widow by her husband set aside in a District Munsiff's Court on a Rs. 15 Court-fee stamp. The subject matter of such a suit is not the small alienation alleged to be invalid and not binding but in substance and in fact the entire estate of the last holder, succession to which is sought to be established. If the value of such estate is more than Rs. 10,000 the Court-fee for such declaration will under Article 17-A of the Court-Fees Act be Rs. 500 and if between Rs. 3,000 and Rs. 10,000 the Court-fee will be Rs. 100, the plaint lying in a sub-Court or District Court as the case may be. In a suit for declarations (1) of the rights of the plaintiffs as nearest reversioners and (2) that the sale deed executed by the widow is not binding on them, on each of the declarations in the plaint a separate Court-fee of Rs. 100 is payable under Article 17-A of the Court-Fees Act. The pecuniary jurisdiction is regulated by the subject-matter of the property involved namely the value of the widow's estate.

V. Parthasarathy for Petitioner.

V. Subramanyam for Respondent.

K.S. ——— *Petition allowed.*

Subba Rao, J. Wahid, *In re.*
7th October, 1948. Cr. R. C. No. 734 of 1948.
(Cr. R. P. No. 691 of 1948).

Madras City Police Act (*III of* 1888), *section* 75—*Conviction under—Order under section* 106, *Criminal Procedure Code* (*V of* 1898) *in addition—Propriety.*

It cannot be said that in a case where the accused is sentenced under section 75 of the City Police Act he should not also be bound over under section 106, Criminal Procedure Code.

1942 M.W.N. Cr. 179 (180), distinguished.

But to warrant an order under section 106, Criminal Procedure Code, the previous convictions against the accused must be proved. Where however the accused himself admitted that he had previous convictions it can be taken as sufficient proof.

I.L.R. 43 Cal. 1128, referred to.

M. Srinivasa Gopalan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) as the Crown Prosecutor on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Mack, J. China Venkatasubba Naidu *v.* Sundaravaradacharlu.
7th October, 1948. C. R. P. No. 344 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 1—*Common question of law or fact arising—Joining as plaintiffs in one suit—Permissibility—Suit held bad for multifariousness—When High Court will interfere in revision.*

Where the main issue which a plaint and the written statements raise are common to all the plaintiffs the plaint can be filed under Order 1, rule 1 of the Civil Procedure Code. The Court will allow the joinder of the plaintiffs or defendants subject to its discretion as to how the action should be tried. Such a suit cannot be said to be bad for multifariousness. The High Court will interfere in the exercise of its revisional jurisdiction when the lower Court has wrongly held a suit as bad for multifariousness when really such suit can and should be tried together to avoid multiciplicity of suits.

Alladi Kuppuswami and *K. Umamaheswaram* for Petitioners.

T. Rangaswami Aiyangar and *V. Vedantachari* for Respondents.

K.S. ——— *Petition allowed.*

Satyanarayana Rao and *Panchapakesa Sastry, JJ.* Jegarao *v.* Venkatrao.
26*th October*, 1948. C. R. P. No. 702 of 1947.

Court-fee—Suit for partition—One of the defendants pleading in his written statement that some of the family properties were purchased benami in the name of other persons fraudulently and collusively and claiming that those items should be brought into the hotchpot—Such benamidars added as parties—Defendant claiming his share, if bound to pay court-fee in respect of his share, in such items as in a suit for declaration.

In a suit for partition by one brother *A* against his other two brothers *B* and *C*, *B* pleaded that some of the family properties were purchased in the names of strangers by the plaintiff fraudulently and collusively and benami with a view to defeat the rights of the several members to the family property. The benamidars were added as defendants. The trial Court *suo motu* and without notice to the other parties directed *B* to pay court-fee on his 1/3rd share in respect of the items alleged to be standing in the names of benamidars. On revision,

Held, *B*'s claim cannot be treated as a plaint; no question of set-off or counter-claim arises in the case within Article I of Schedule I of the Court-fees Act and there is no provision in the Court-fees Act which requires court-fee to be paid in respect of such a claim by a defendant in a partition suit. Further the order directing *B* to pay Court-fee is also vitiated by irregularity in that it did not give an opportunity to the parties to be heard.

C. Rama Rao Sahib for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

K. Bhimasankaram for Respondent.

K.S. ——— *Petition allowed.*

Panchapakesa Aiyar, J. Chayichan *v.* Janaki.
28*th October*, 1948. C. R. P. No. 1111 of 1947.

Madras Tenants' and Ryots' Protection Act (XVII of 1946)*—Panayam deed stipulating for annual rent to be adjusted towards interest on advance rent, etc.—Person paying the rent when tenant and not usufructuary mortgagee—Right to stay under Act XVII of* 1946.

A document styled a *panayam* deed or *panayam pattam* deed stipulated for an annual rent of Rs. 62-8-0 and said that out of the rent Rs. 3 should be deducted as interest on the advance rent *munapattam* of Rs. 60 given as security for the payment of rent and another Rs. 2-8-0 for the cost of protection of *kuzhikoors* and that the remaining *purappad* of Rs. 57 was to be paid by the petitioner to the respondent in the month of *Kanni* every year together with the *Makarakappa* of Re. 1.

Held, that the petitioner must be taken to be a "tenant" under the Malabar Tenancy Act, and so entitled to a stay under Act XVII of 1946, subject to his satisfying the other conditions prescribed by the Act. It cannot be said that the petitioner was a mortgagee and not a tenant.

B. Pocker and *P. A. Quadir Meeran* for Petitioner.

N. R. Sesha Aiyar for Respondent.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and *Panchapakesa Ayyar, J.*
16th September, 1948.

Sri Lakshmi Narasimha Devaru *v.* Raghunatha Nayak.
Appeals Nos. 608 and 679 of 1946.

Land Acquisition Act (I of 1894)—Agricultural land—Acquisition—Compensation for —20 years' purchase for capitalising net annual income—Propriety of fixing.

20 times the annual net income can properly be adopted as furnishing the correct value of agricultural lands (wet as well as dry) in fixing compensation for their acquisition under the Land Acquisition Act.

(1948) 2 M.L.J. 159, distinguished.

A. Narayana Pai for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) and *C. Vasudeva Mannadiar* for Respondent.

K.S. *Appeals allowed in part.*

Rajamannar, C. J. and *Somasundaram, J.*
5th October, 1948.

Narayana Rao *v.* The Collector of Madras.
Appeal No. 223 of 1947.

Land Acquisition Act (I of 1894)—Compensation—Valuation—Loss of frontage of other property—Higher compensation if can be claimed—Separate head of claim for damages —Necessity.

Merely because of the acquisition of a site the frontage of the owner's other property has been pushed back into the interior it cannot be said that he is entitled to a higher compensation for the property acquired. If the claimant desired to claim any amount on that ground, it must have formed a separate head of claim for damages for severance.

L. S. Veeraraghava Aiyar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S. *Appeal allowed in part.*

Rajamannar, C.J. and *Somasundaram, J.*
6th October, 1948.

Sourirajulu Naidu *v.* Chief Judge, Court of Small Causes, Madras.
C. M. P. No. 4139 of 1948.

Writ of certiorari*—Grounds on which issued—Order of appellate tribunal under Madras Buildings (Lease and Rent Control) Act—Interference with—Grounds for.*

The grounds on which a writ of *certiorari* could issue are (1) defect of jurisdiction from the nature of the case, (2) defect of jurisdiction from interest or the constitution of the tribunal, (3) fraud and (4) error on the face of the proceedings. Where upon the face of the proceedings themselves it appears that the determination of the inferior Court is wrong in law, *certiorari* to quash will be granted by the High Court, but the error of law must be patent from the proceedings as set out in the order itself and it must be clear that the conclusion of the tribunal was not warranted by law. *Certiorari* will not be granted on the ground that the decision in wrong on matters of fact. It is not open to the High Court to examine the correctness of findings of fact. A landlord who seeks to evict his tenant by filing an application under section 7 of the Madras Buildings (Lease and Rent Control) Act, 1946, can by subsequent conduct preclude himself from obtaining the relief of eviction. If the tenant was able to establish facts which would satisfy the Controller or the appellate tribunal that there had been a waiver or a continuance of the tenancy, he would have shown cause against the application.

49 C.W.N. 433, distinguished.

V. Radhakrishnayya for Petitioner.

T. R. Venkatarama Sastri, N. Gopala Menon and *K. Varadachari* for Respondents.

K.S. *Petition dismissed.*

NRC

Panchapakesa Ayyar, J. Hansraj Bhandari *v.* Ramachandran.
6th October, 1948. C. R. P. No. 1261 of 1946.

Evidence Act (*I of* 1872), *section* 92—*Pledge evidenced by a writing—Oral evidence as to true nature of transaction—When admissible.*

The Courts have no general power to go behind a transaction (in this case a pledge) evidenced by writing and take oral evidence, despite the provisions of section 92 of the Indian Evidence Act, unless some of the circumstances mentioned in the proviso to that section, like fraud are alleged and proved. A general right to find out the truth by letting in oral evidence to prove the real intention of the parties to a written agreement is not given by section 92, whose very object would be frustrated by giving such a general right to Courts.

The Advocate-General (*K. Rajah Aiyar*) and *A. N. Viraraghavan* for Petitioner.

P. V. Subramaniam for Respondent.

K.S. ——— *Petition allowed and fresh trial ordered.*

Satyanarayana Rao and *Panchapagesa Sastri, JJ.* Parasuram Byias *v.*
7th October, 1948. Venugopala Rao.
Appeal No. 182 of 1948.

Deed—Construction—Deed for benefit of creditors—Absence of words of transfer—Effect—Creates only agency.

A document for benefit of his creditors was executed by a debtor in favour of *X* providing for sale of the properties and distribution among his creditors. The document concluded thus : " . . . . Hence, if you should keep the schedule mentioned properties in your possession, effect sale and clear the debts, we or our heirs shall not cause any obstruction to or raise any dispute with you in any manner. If any such things should arise, we shall, at our cost, clear all of them and see that the sales, etc., to be effected by you shall stand."

Held, the concluding clause made the agency irrevocable and authorised the agent to give a covenant for title for the properties conveyed by him to others. Though described as a trust the document in the absence of clear words of transfer cannot establish a trust. *X* therefore was not a trustee, but merely an agent to sell the property and distribute it in the manner indicated in the document. The document did not transfer the title to the properties to *X*. But sales made by *X* in the exercise of the power conferred on him by the document will confer a valid title on the purchasers, and a person buying the property in execution of a decree against the debtor will not acquire title to property sold away by *X* before that date.

The Advocate-General (*K. Rajah Aiyar*) and *K. Krishnamurthi* for Appellant.

V. Rangachari, P. Somasundaram and *K. Kameswara Rao* for Respondents.

K.S. ——— *Appeal allowed in part.*

Mack, J. Shanmugam Pillai *v.* Sri Sankaranarayanaswami Devasthanam.
7th October, 1948. C. R. P. No. 1057 of 1947.

Court-Fees Act (*VII of* 1870), *Schedule II, Article* 17-*A*—*Suit under section* 44-*B of Madras Hindu Religious Endowments Act for declaration that order of Collector directing resumption of inam is wrong—Court-fee.*

A suit under section 44-B of the Madras Hindu Religious Endowments Act for a declaration that the order of the District Collector confirming the order of the Revenue Divisional Officer directing the resumption of an inam is wrong requires when the lands are worth more than Rs. 10,000 a court-fee of Rs. 500 under Article 17-A of Schedule II of the Court-Fees Act. The Collector passing the order was not a Revenue Court passing a summary order and therefore the plaint cannot be filed with a court-fee of Rs. 15 under Article 17 (1) of Schedule II of the Court-Fees Act.

C. S. Rajappa for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

K. V. Ramachandra Aiyar for Respondent.

K.S. —————— *Petition dismissed.*

Govinda Menon, J. Venkatarama Iyer, *In re.*
26th October, 1948. Cr. R. C. No. 1369 of 1947.
(Cr. R. P. No. 1244 of 1947).

Madras Prohibition Act (X of 1937)—Licence to doctor to keep one quart bottle of brandy—" Quart bottle "—Meaning—Possession of 31 ounces—If above quart bottle—Copies of prescription—If should be produced.

A doctor with a licence to keep in his possession " one quart bottle of brandy " was found to have in his possession 31 ounces of brandy and was convicted by the lower Courts on the evidence of the Prohibition Inspector that the expression " quart bottle " means a bottle containing 26⅔ ounces. On revision,

Held, when one has to interpret the meaning of an English term, the proper guides will be standard dictionaries like the Oxford Dictionary or Chambers Dictionary, or where the matter is one relating to a scientific term books relating to that subject. According to such books a quart means two pints or 40 ounces. Books on Materia Medica also define it in the same way. Unless the prosecution is able to show that it is understood in a different way either customarily or according to a legal usage, the Courts will not be justified in deviating from the meaning of the term given in such well-known books. Accordingly the lower Court's interpretation of the term " quart " is incorrect and the accused cannot be guilty of the offence charged.

Where the conditions of the licence do not impose any obligation to keep copies of the prescriptions issued, the accused cannot be held to be guilty on the ground that copies of the prescriptions issued had not been produced. It might be that persons of position and status in the medical profession always keep copies of prescriptions issued by them, or it might even be that the rules of conduct or professional etiquette among doctors require that such copies should be kept; but the transgression of such rules does not make the omission to keep copies an offence under the law.

T. A. Anantha Aiyar and *C. S. Swaminathan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. —————— *Conviction set aside.*

Panchapakesa Ayyar, J. Krishnan Nair *v.* Valliammal.
26th October, 1948. C. R P. No. 974 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946)—Small Causes Court hearing appeals against orders of Rent Controller—Is Court and not persona designata*—Revision lies to High Court—Rule making Small Causes Court the appellate authority—Not* ultra vires*—Premises primarily let for residential purposes—Use of one room partly for non-residential purpose—Effect.*

The Small Causes Court hearing appeals against orders of the Rent Controller is a Court and not a *persona designata* and a revision lies to the High Court against the orders of the Small Causes Court. The rule making the Small Causes Court (instead of the Chief Judge of Small Causes as formerly) the appellate authority is not *ultra vires* and the Small Causes Court is " the authority " to hear appeals against orders of the House Rent Controller. Where a premises is taken and used primarily for residential purposes the use of one room for non-residential purposes (making *appalams* for sale) will not make the house one used for non-residential purposes.

A lawyer may use a room of his house for giving legal advice to his clients; an astrologer may use a room of his house for giving predictions; a barber may use a room of his house for shaving his clients; but such use of a room will never make the house itself one used for " non-residential purposes." An objection

as to absence of notice to quit not raised in the revision petition cannot be entertained at the hearing of the revision petition.

N. Gopala Menon for Petitioner.

V. Srinivasan and *T. R. Ramachandran* for Respondent.

K.S. *Petition dismissed.*

Somasundaram, J. Kamalammal *v.* Rajarathna Naicker.
26th October, 1948. C. R. P. No. 1250 of 1946.

Limitation Act (*IX of* 1908), *Article* 182 (5)—*Application for transmission of decree to another Court without filing copy of decree as required by rule* 142 *of the Madras Civil Rules of Practice—Not in accordance with law—Application dismissed as "not pressed"—If "final order."*

A decree was passed on 21st July, 1932, by the District Munsiff of Ranipet. In February 1935, the village to which the parties belonged was transferred from the jurisdiction of the Ranipet Court to that of the Vellore Court. On 21st July, 1935, the last day of limitation, an execution petition for transmission of the decree was filed in the Court of the District Munsiff of Ranipet. The petition was returned with an order of Court on 25th July, 1935, that the decree-holder should produce a copy of the decree and seven days' time was granted for the same. The petition was re-presented on 31st July, 1935. with an endorsement "not pressed," but not accompanied by a copy of the decree. On 1st August, 1935, the petition was dismissed as "not pressed." A similar application was filed on 21st July, 1938, and it was also similarly dismissed on 5th August, 1938. Another applicction for transmission to Vellore Court was filed on 23rd June, 1941 and an order of transmission was passed on 26th June, 1941. The decree was received in Vellore Court on 2nd July, 1941, and it was returned on 6th January, 1942, as no steps were taken. On 10th June, 1944, an application was filed in the Court of the Ranipet District Munsiff and transmission was ordered on 13th June, 1944, and an execution petition was filed in the Vellore Court on 1st July, 1944. On the question of limitation,

Held, the orders of the Ranipet District Munsiff passed on 1st August, 1935, and 5th August, 1938, were "final orders" within the meaning of that expression in Article 182 (5) of the Limitation Act. The fact that the petitions were dismissed as "not pressed" does not make any difference. (1948) 1 M.L.J. 327, relied on.

The combined effect of sections 121, 122 and 127 of the Civil Procedure Code. is to make the Civil Rules of Practice, part of the Code. Under rule 142 of the Madras Civil Rules of Practice the filing of a copy of the decree with an application for transmission of the decree is mandatory and failure to comply with that mandatory provision makes the petition of 1935 re-presented without a copy of the decree is not "in accordance with law" and the order passed thereon will not enure to the benefit of the decree-holder.

B. V. Viswanatha Aiyar for Petitioner.

M. Natesan for Respondent.

K.S. *Petition dismissed.*

Panchapakesa Ayyar, J. Borayya *v.* Ramakoti Sastri.
27th October, 1948. C. R. P. No. 312 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 16, *rule* 19 (b)—"*Established public conveyance*"—*Meaning—If includes bus services on various routes.*

"The established public conveyance" mentioned in Order 16, rule 19 (*b*), Civil Procedure Code, does not mean disconnected buses belonging to different companies and with no certainty of continuous travel. Any witness however important is entitled to ask to be examined on commission if he lives outside its jurisdiction in a place more than 200 miles from the Court house and there is no fraud or *mala fides* in such application. Where a witness resides at a place which is 300 miles by train, he cannot be denied the right to examination by commission on the ground that the place is less than 200 miles if a person is to travel by buses by changing at various places.

W. Kothandaramayya for Petitioner.

T. S. Vaidyanatha Aiyar for Respondent.

K.S. *Petition dismissed.*

Panchapakesa Ayyar, J. Venkatasubba Rao *v.* Sreeramulu.
27th October, 1948. C. R. P. No. 844 of 1948.

Civil Procedure Code (V of 1908), *section* 51—*Order for arrest—Necessity to record the reasons—Reasons given in prior arrest order not of avail.*

The Legislature has thought fit to order arrest and detention of civil debtors in jail only where the conditions prescribed in section 51 of the Civil Procedure Code are strictly satisfied. The Court acts without jurisdiction in ordering the arrest of a debtor without recording its reasons under section 51 of the Code. The reasons must be given *every time a man is ordered to be arrested,* and in every proceeding where he is ordered to be arrested, even if it is on the same day; for, cases differ, and much depends on lapse of time also. It is not sufficient that reasons had been given on a former occasion when the debtor was ordered to be arrested in the same case.

K. Venkataramana and *G. Suryanarayana* for Petitioner.

C. V. Dikshitulu for Respondent.

K.S. *Petition allowed.*

Subba Rao, J. The Public Prosecutor, Madras *v.* Thippayya.
29*th October*, 1948. Cr. A. Nos. 629, etc., of 1947 and 22 and 23 of 1948.

Evidence Act (I of 1872), *section* 57—*Applicability—Charges under sections* 7 *and* 8 *of the Essential Supplies (Temporary Powers) Act (XXIV of* 1946) *of contravening orders passed by Government—Order and their due publication—Proof—Court if should take judicial notice of orders as " Indian Laws."*

The scheme of the Evidence Act is clear. Generally all the facts alleged have to be proved in the manner provided by the Act but there are three exceptions; facts admitted, facts presumed and facts of which the Court should take judicial notice. Under section 57 (1) of the Evidence Act the Court should take judicial notice of all Indian Laws. " Indian Laws " is defined by the General Clauses Act under section 3 (27-*a*). It includes any law, ordinance, order or bye-law, rule or regulation passed or made at any time by competent Legislature, authority or person in British India. Under section 3 (1) of Act XXIV of 1946, the Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Under section 4 of that Act the Central Government may by notified order direct that the power to make orders under section 3 shall be exercisable by such officer or authority subordinate to the Central Government or such Provincial Government or such officer or authority subordinate to a Provincial Government as may be specified in the direction. Section 7 (1) prescribes the penalties for contravention of the said orders. Where such orders have been issued in strict compliance with the provisions of the Act by the Government or authority or person duly authorised and duly notified in the manner provided by the Act, the orders will come within the definition in section 3 (27-*a*) of the General Clauses Act and therefore part of " Indian Law." Accordingly the provisions of section 57 of the Evidence Act are attracted and the Court should take judicial notice of the same. But it could only take such notice if unimpeachable books or documents are put before it or otherwise accessible for its reference. The Court is given the discretion to refuse to take judicial notice of any fact unless such person calling upon the Court to take judicial notice of such facts produces any such book or document as it may be necessary to enable it to do so. Where the lower Court in its discretion refused to take judicial notice as neither the orders under Act XXIV of 1946 nor the documents showing the publication of such orders were placed before it by the

prosecution, it is impossible to say that the discretion exercised by the lower appellate Court is either perverse or illegal in setting aside the conviction. Such a case is not a fit one for interference by the High Court in appeal.

The Public Prosecutor (*V. L. Ethiraj*) for Appellant.

B. V. Ramanarasu, V. T. Rangaswami Aiyangar, P. Rama Reddi, P. Chandra Reddi, K. Venkataratnam and *M. V. Nagaramiah* for Respondents.

K.S. ——— *Appeals dismissed.*

Panchapakesa Ayyar, J. Dharmalinga Chetty *v.* Krishnaswami Chetty.
29th October, 1948. C. R. P. No. 1270 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 17—*Amendment of written statement —Application for—Alleged falsity of case in the amendment—If can be gone into.*

In an application for amendment of a written statement the alleged falsity of the case in the amendment need not and should not be gone into; if his case is false the party will fail in the suit itself with costs.

T. Ramaprasada Rao and *M. Paul Mohammad Usman* for Petitioner.

M. Natesan for Respondent.

K.S. ——— *Petition allowed.*

Mack, J. Abdurahiman Settu *v.* Muhammad Kasim Settu.
29th October, 1948. C. R. P. No. 668 of 1947.

Civil Procedure Code (*V of* 1908), *section* 35 *and Order* 26, *rule* 15—*Expenses of commission—If can be made to include expenses of other parties—Discretion of Court to order deposit of expenses by the party at whose instance commission was taken out—Expenses incurred by the opposite party when can be ordered to be defrayed by the party who took out the commission.*

The "expenses of the commission" can be made to include expenses of the other parties to the litigation and can in suitable cases be ordered to be deposited by the party at whose instance the commission was taken out. Where however the trial Court expressed the view that it was not a fit case in which any such deposit should be ordered, the opposite party is not entitled to ask for payment by the party at whose instance the commission was taken out to defray the expenses in a commission to examine witnesses in various places. In such a case expenses of the opposite party incurred in the commission will of course be considered at the time of the judgment when the value of the evidence obtained by the commission can be fully assessed.

M. K. Nambiar, T. C. Raghavan and *M. Sekhara Menon* for Petitioner.

S. Venkatachala Sastri for Respondent.

K.S. ——— *Petition dismissed.*

Panchapakesa Ayyar, J. Eswaramma *v.* Chinna Kota Reddi.
29th October, 1948. C. R. P. No. 838 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 33—*Application for leave to sue as pauper—Question of pecuniary jurisdiction and competency of Court to entertain suit—Must be gone into before deciding question of pauperism.*

Where a respondent to an application for leave to sue as pauper raises the objection that the suit was beyond the pecuniary jurisdiction of the Court it is the duty of the Court to get rid of that objection, by deciding that the suit was within its pecuniary jurisdiction, before proceeding to consider the question of pauperism, both on general principles and the question of convenience of the parties. In a suit beyond its pecuniary jurisdiction the only power the Court has under the law is to return the plaint for presentation to the proper Court, and it has no power to hold any enquiry into pauperism, mesne profits or any other matter whatsoever.

(1948) 2 M.L.J. 150 followed.

Decision of Mack, J. in C. R. P. No. 762 of 1947 dated 13th August, 1948, dissented from.

T. S. Vaidyanatha Aiyar for Petitioner.

W. Kothandaramiah for Respondent.

K.S. ——— *Petition allowed.*

Govinda Menon, J.
3rd November, 1948.

Velayuda Mudali, *In re.*
Cr. R. C. Nos. 394 to 397 of 1948.
(Cr. R. P. Nos. 363 to 366 of 1948).

Criminal Procedure Code (*V of* 1898), *section* 494—*Withdrawal of case after framing of charges with permission to file fresh complaint—Effect—Fresh complaint if can be filed.*

A calendar case on the file of a Sub-Divisional Magistrate was the result of a charge against 40 accused for various offences under the Penal Code. When that was taken up for hearing 6 of the accused were absconding and so the case was split up against the absconders re-numbered and transferred to the Additional First Class Magistrate. Meanwhile the enquiry against the remaining 34 accused was proceeded with and charges framed against them under sections 147, 448, 427, 435, 325 and 332, Penal Code. Afterwards this case also was transferred to the Additional First Class Magistrate and on an application by the accused in both cases, the cases were clubbed together as one and intended to be tried as such. The accused again filed an application praying that as a combination of charges under sections 325 and 332 of the Penal Code would constitute the more serious offence under section 333 of the Penal Code exclusively triable by a Court of Session, the Calender cases should be converted into a Preliminary register case and proceeded with on that basis. After arguments the two cases were converted into a Preliminary register case. During the progress of enquiry of this case the Public Prosecutor applied under section 494, Criminal Procedure Code, for permission to withdraw the case stating also that the intention was to file separate prosecutions against the accused differently for various offences. The Court granted the permission for withdrawal and discharged the accused under section 494 (*a*), Criminal Procedure Code. In cases subsequently filed against different groups of accused,

Held, in the absence of a provision in the Criminal Procedure Code, similar to Order 23, rule 1, Civil Procedure Code, allowing the withdrawal of a case with permission to file on the same facts, a fresh complaint, the order allowing withdrawal amounts to an acquittal and a fresh complaint cannot be filed. A charge once framed cannot be obliterated except by a conviction or acquittal. So any withdrawal with permission to file a fresh complaint cannot be understood as the keeping alive of the charge. The withdrawal of a case after the framing of a charge, can amount to the acquittal of the accused and nothing else. It is not necessary to convert the nomenclature of the case from Calendar case to Preliminary register case when it appears to the trial Court that the case ought to be tried by a Court of Session or the High Court. The alteration of the nomenclature into a Preliminary register case does not legally affect the nature of the proceedings and the prosecution is not entitled to file a fresh charge sheet against the accused for such of the offences for which charges had already been framed.

P. C. Parthasarathy for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Petitions allowed in part.

Govinda Menon, J.
3rd November, 1948.

Parameswarayya, *In re.*
Cr. R. C. No. 635 of 1948.
(Case Referred No. 38 of 1948).

Criminal Procedure Code (*V of* 1898), *section* 403—*Conviction for offence under section* 337, *Penal Code—No bar to further trial of same person for offence under section* 307, *Penal Code.*

The conviction of a person for an offence under section 337 of the Penal Code is no bar to the further trial of the same person for the more serious offence under section 307 of the Penal Code which might include the ingredients which already constituted the offence under the minor section. A District Magistrate could himself order a further inquiry under sections 436 and 437 of the Criminal Procedure Code for the offence under section 307 of the Penal Code where he thinks that such an offence has been committed though the Stationary Magistrate has convicted the accused under section 337 of the Penal Code. It is not necessary

to make a reference to the High Court under section 438 of the Criminal Procedure Code.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ———— *Directed that no further action is necessary.*

Rajagopalan, J. Alagirisami Naidu *v.* Chinna Veerammal.
4th November, 1948. Cr. R. C. No. 865 of 1947.
Cr. R. P. No. 755 of 1947.

Criminal Procedure Code (V of 1898), *section* 146 (1)—*Power to attach property in dispute when it is found that both parties were in possession of portions of land in dispute on date of preliminary order.*

It cannot be said that once a conclusion is reached that both the parties were in possession of portions of the land in dispute on the date of the preliminary order, no matter how recent was that possession of one or the other, the Court loses all jurisdiction vested in it under section 146 (1), Criminal Procedure Code.

27 M.L.J. 169 and 1935 M.W.N. 367, distinguished.

K. Veeraswami for Petitioner.

V. Ramaswami Aiyar for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ———— *Petition dismissed.*

Panchapakesa Ayyar, J. The Madras Electric Tramways, Ltd. *v.* Muniswamy.
4th November, 1948. C. C. C. A. No. 26 of 1947.

Tort—Negligence—Trolley pole of tram-car belonging to defendant falling on and injuring cyclist—Negligenc—Presumption—Principle of res ipsa loquitur—*Applicability.*

The principle of *res ipsa loquitur* will apply to a case where the trolley pole of the defendants' tramcar fell on and injured the plaintiff and his cycle. Poles of tram cars and their bases do not come down of themselves and negligence can be presumed when they so come down. To avoid liability the defendant will have to adduce strict proof that it was due to an inevitable accident.

W. S. Krishnaswami Naidu and *J. Lakshmikantam* for Appellant.

T. A. Ananta Aiyar for Respondent.

K.S. ———— *Appeal dismissed.*

Panchapakesa Ayyar, J. Jayammal *v.* Sampath Naidu.
4th November, 1948. C. C. C. A. No. 49 of 1947.

Easements—Natural rights—Right of adjoining owner of land on higher level to discharge rain water on land of neighbour on a lower level—Presumption—Owner of land on lower level—If can raise the level without making provision to receive storm water.

While an adjoining owner of land on a lower level bound to receive rain and storm water from the land of his neighbour on a higher level can improve his lands to any extent he pleases—even to the extent of raising the level of his lands, he is bound to make suitable arrangements for receiving and carrying off the water from his neighbour's land before he raises the level of his land or does an act infringing such natural right. Such natural rights do not get extinguished like ordinary easements but only get extinguished by natural causes like the level of the lands being altered by earthquakes etcetra. When the Corporation of Madras which had on the failure of the owner of the lower land to fill up a tank in his land itself filled up the tank (in the interests of public health) and raised the land above the level of the neighbour's land, the right of the owner of the higher land will not be extinguished and the owner of the lower land can be compelled by a mandatory injunction to put up a channel at his own cost to receive and carry off the water from the adjoining land especially where that right had been perfected by prescription by uninterrupted enjoyment for more than forty years.

As the right claimed was not an easement the servient owner cannot rely on section 25 of the Easements Act, and say that he cannot be compelled to spend any money in constructing the channel.

G. Jagadisa Aiyar for Appellant.

V. Seshadri and *K. S. Ramamurthi* for Respondent.

K.S. ———— *Appeal allowed.*

Subba Rao and Mack, JJ. Venkataraman *v.* Commr. of Police, Madras.
27th October, 1948. Cr. M. P. No. 1910 of 1948.

Madras Maintenance of Public Order Act (I of 1947), *sections* 2 (1), (2) *and* 3 (1)—*Scope—Order for detention valid at its inception—If becomes invalid by reason of non-compliance of authorities with requirements of sections* 2 (2) *or* 3 (1)—*Grounds of detention—Antecedent conduct of detenu—If can be taken note of.*

An order for detention of the petitioner was made by the Commissioner of Police who was duly authorised by the Provincial Government on 1st April, 1948. The Commissioner of Police communicated the said order to the Government under section 2 (2) of Act I of 1947 on 9th June, 1948. On the 11th September, 1948, the Government served the grounds of detention on the petitioner who was arrested on 17th August, 1948. In an application for the issue of a writ of *Habeas Corpus* it was contended *inter alia* that though the order for detention was valid when passed, it became invalid in view of the non-compliance with the provisions of sections 2 (2) and 3 (1) of Act I of 1947 and therefore the detention was illegal.

Held : (1) the order was in strict compliance with the provisions of section 2 (1) of the Act and therefore valid. (2) Assuming that in view of the enormous delay in communicating the order to the Government by the Commissioner of Police, the provisions of sections 2 (2) and 3 (1) of the Act have not been complied with, it will not have the effect of invalidating an order that had been validly passed. Sections 2 (2) and 3 (1) were designed to provide a machinery for the person against whom the order has been passed to seek redress as early as possible. If a statutory authority did not comply with the provisions of section 2 or 3, there may be other remedies open to the aggrieved party, but the non-compliance with the provisions prescribing a procedure to get redress by the aggrieved party against whom an order has been passed under section 2 (1) cannot in law invalidate an order validly passed under section 2 (1). In any view as the order had been communicated to the Government and the grounds of detention were duly served on the petitioner the detention cannot be held to be invalid.

It cannot be said that in no circumstances the antecedent conduct of a detenu could be taken note of by the concerned authority to satisfy himself whether the person ordered to be detained is acting or is about to act in a manner prejudicial to public safety. The antecedent conduct would certainly afford data or furnish reasonable grounds in finding out the present attitude of the person concerned.

A. K. Pillai for *Messrs. Row* and *Reddi* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S. *Petition dismissed.*

Panchapakesa Ayyar, J. Venkata Reddi *v.* Nimmakayala.
27th October, 1948. C. R. P. No. 800 of 1947 & S.A. No. 933 of 1947.

Civil Procedure Code (V of 1908), *Order* 23, *rule* 1—*Appeal—Dismissal and allowing party to withdraw suit with liberty to file fresh suit—Failure to give reasons—Effect.*

Any Court allowing a party to withdraw from a suit with liberty to file a fresh suit at a late stage after arguments have been addressed in appeal, is bound to give satisfactory reasons falling within Order 23, rule 1, Civil Procedure Code. If the Court makes such order without giving the reasons it acts without jurisdiction and with material irregularity and the order must be set aside in revision.

A. C. Sampath Aiyangar for Petitioner.

C. A. Vydialingam, T. Venkatadri and *K. Ramachandra Rao* for Respondent.

K.S. *Petition allowed & appeal remanded.*

Panchapakesa Ayyar, J. Chandra Reddi *v.* Rami Reddi
29th October, 1948. S. A. No. 2159 of 1945.

Civil Procedure Code (V of 1908), *Order* 41, *rule* 33—*Appeal—Finding that suit is based on false claim—Power to dismiss suit even as against those who had not appealed.*

If it is found on appeal that a suit is based upon a false claim, then the whole suit could be dismissed even against those who had not appealed or had not contested the suit. It will be quite unreasonable and will lead to contempt for Courts and their decisions if the whole basis of a plaintiff's claim is found to be false but his claim is dismissed only against those who pay the necessary Court-fee and engage learned counsel, and contest the suit or file appeals, but not against those who are either through ignorance or poverty, unable to do so. The mere fact that the lands claimed in the case from several defendants are different will not make any difference when the basis of the claim is one and the same and the plaintiff's case must stand or fall on that basis. The word "party" means only a "party to the suit," and need not mean a "party to the appeal" for the purposes of Order 41, rule 33, Civil Procedure Code.

B. V. Ramanarasu for Appellant.

Srimati G. Durga Bai and *N. Subramanyam* for Respondents.

K.S. *Appeal dismissed. Leave to appeal granted.*

Mack, J. Arumugham *v.* Nagammal.
2nd November, 1948. A. A. O. No. 417 of 1947.

Workmen's Compensation Act (VIII of 1923), *section* 2 (n)—*Contractor for unloading waggons at railway station—Employment of maistry who engaged coolies to whom he paid at a fixed sum of Rs.* 5-4-0 *for unloading a wagon keeping* 4 *annas for himself per wagon —One of the coolies injured while unloading—If "workman" entitled to compensation from the contractor.*

A had a contract to unload wagons at Avadi station for which he was paid Rs. 7-0-0 for each wagon. He had a maistry who worked under him and engaged coolies to whom he paid Rs. 5-4-0 for unloading each wagon keeping 4 annas for himself per wagon. One of the coolies was injured while unloading and his dependants claimed compensation,

Held, that the cooly was a "workman" within the meaning of section 2 (*n*) of the Workmen's Compensation Act. To fall within the exception to the section the employment must be casual and in addition that the person was employed otherwise than for the purpose of his employer's business. As the cooly was employed at the time of the accident for the purpose of unloading the wagon which was the business of the contractor, he is a "workman" and his dependants are entitled to recover compensation form the contractor.

K. E. Rajagopalachari and *P. B. Ananthachari* for Appellant.

K. Arunachala Sastri for Respondent.

K.S. *Appeal dismissed.*

Panchapakesa Ayyar, J. Sinnathambi *v.* Nachimuthu Goundan.
2nd November, 1948. S. A. No. 234 of 1946.

Hindu Law—Joint family—Loan for family benefit and necessity—Manager not party to loan—When liable.

There must be a positive finding that the loan was utilised for family benefit and necessity, and was enjoyed by all the members of the family including the family manager who was no party to the loan either expressly or impliedly before such manager could be made liable for it. 23 Mad. 597, distinguished.

R. Rajagopala Aiyangar for Appellant.

C. A. Vaidyalingam for Respondent.

K.S. *Appeal allowed. Leave to appeal granted.*

Satyanarayana Rao and Panchapakesa Sastri, JJ. Venkata Rao *v.* Venkatakumaramahipati Surya Rao.
3rd November, 1948.
S. A. No. 1082 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 57 (*as amended in Madras*)—*Rejection of unnumbered execution petition on default in representing with sale papers—Effect on attachment before judgment—Order of rejection not saying that attachment will cease—Effect.*

A decree-holder filed an execution petition for bringing the house which was attached before judgment to sale and for leave to set off under Order 21, rule 72. The petition which was unnumbered was returned for filing the sale papers and encumbrance certificate, granting two weeks' time. It was re-presented with a prayer for further week's time. But that petition was rejected by the Court.

Held, the order rejecting the petition must be treated as one of dismissal and the unnumbered petition cannot be said to be one which had no legal existence. The effect of the dismissal of the petition will be that the attachment before judgment ceased. The language of Order 21, rule 57 (Madras) does not make it a condition precedent for the termination of the attachment that the Court should make an order that the attachment ceased. It merely directs the Court to state the consequences of the dismissal by reason of the decree-holder's default that brings about the termination of the attachment. If the Court omitted to state so, it would not prevent the attachment from coming to an end.

For the determination of the attachment in cases not covered by the proviso to rule 57, ordinarily an order of the Court would be necessary and the omission to state whether the attachment continues or ceases would probably result in the continuance of the attachment.

P. Somasundaram for Appellant.

Ch. Raghava Rao for Respondent.

K.S. ——— *Appeal allowed.*

Panchapakesa Ayyar, J. Ramachandra Rao *v.* Venkata Narasimharayanim Garu.
3rd November, 1948. S. A. No. 295 of 1946.

Madras Estates Land Act (*I of* 1908), *section* 192 (5)—*Scope—Admitted amount of rent not deposited—Trial Court not exercising powers under section* 192 (5) *as regards excess rent—Appellate Court when can reject appeal.*

Once *the trial Court* tries the suit on merits, taking also the plea of excess rent into consideration and does not take the powers conferred on it by section 192 (5) of the Estates Land Act for refusing to take cognizance of the plea regarding the excess rent, due to failure of the tenant to deposit the admitted rent, *the appellate Court* can exercise that power only after going through the procedure prescribed by section 192 (5) of the Estates Land Act. Besides section 192 (5) only takes away the right of the appellant to raise *the plea that the rent claimed is excessive* if he fails to deposit the amount directed to be deposited under section 192 (5). *All other pleas raised by him* will be open to him and must be discussed. Such pleas may be that he is not a tenant or that the amount due from him is barred by limitation, or that he has paid all the amounts due by him, etc.

M. S. Ramachandra Rao for Appellant.

C. A. Vaidyalingam and *T. Venkatadri* for Respondent.

K.S. ——— *Appeal allowed and case remanded.*

Rajagopalan, J. Ramaswami Chettiar, *In re.*
5th November, 1948. Cr. R. C. No. 1362 of 1947.
(Cr. R. P. No. 1257 of 1947).

Penal Code (*XLV of* 1860), *sections* 186 *and* 342—*Firka supply officer entering accused's house for seizing stock of paddy—Absence of authority to make seizure—Obstruction to officer and locking him in—Offence committed.*

The accused was a villager who on 6th March, 1947, had in his possession $17\frac{1}{2}$ bags of paddy. The Firka Supply Officer reached the house of the accused at about 8-30 P.M. or possibly a little later. The officer had come to the village that day to procure paddy, apparently the surplus paddy within the meaning of G. O. (Mis.) 467, dated 15th June, 1946. He had a list with him (the "D" list apparently containing the names of persons from whom the officer had to obtain that surplus paddy). The name of the accused was not in that list. When the officer entered the house of the accused and found $17\frac{1}{2}$ bags of paddy, he asked if the accused had a permit for possession of those bags. When the accused said that he had no permit, the officer asked the accused to surrender the entire quantity of paddy but the accused resisted that claim. After recording the statement of the accused, the officer declared his intention of seizing the stock and went inside the house to effect the seizure. When the officer went inside, the accused locked the outer door and the officer had to stay inside that house till he was released the next morning by the village munsiff. The accused was convicted under sections 342 and 186 of the Penal Code. On revision,

Held, the conviction under section 186 of the Penal Code cannot be sustained. There is nothing in G.O. No. 467 of 15th June, 1946, which can be construed as authorising that officer to seize any paddy he found in the house of any ryot and there was nothing to indicate that any portion of the $17\frac{1}{2}$ bags was surplus within the meaning of the rules. In the circumstances the officer cannot be said to be discharging his functions as a public servant when he entered the house and the conviction and sentence under section 186 of the Penal Code cannot be sustained. Though the accused had the right of private defence of property, in keeping the officer locked up far beyond the limits dictated by the need to protect the property and to prevent criminal trespass the accused committed an offence punishable under section 342 of the Penal Code.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

Balasubramanian for The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. — *Conviction under S. 342 of the Penal Code confirmed but sentence reduced.*

Horwill and Govinda Menon, JJ. — Public Prosecutor, Madras *v.* Arokia Nadar.
5th November, 1948. — Crl. A. No. 378 of 1948.

Criminal Trial—Evidence—Medical witnesses—Proper stage for examining.

It is desirable to examine in a murder trial the doctor who made the post-mortem examination at a late stage in the case, when the Judge is fully aware of the nature of the attack, of the condition of the accused after the attack and of other evidence important from the medico-legal point of view, so that he is able to ask the medical witness the questions necessary to ascertain the precise cause of death and to clear up any difficulties or doubts that may have arisen in his mind from a consideration of the other evidence. When the medical witness is examined as the first witness in the case, neither the Judge nor the advocates can be fully aware of the points that arise for determination in connection with the cause of death of the deceased and the nature of the offence committed.

The Public Prosecutor (*V. L. Ethiraj*) in person.

K. Veeraswami for the Respondent.

K.S. — *Appeal allowed.*

Mack, J. — Polammal *v.* Rathna Mudaliar.
9th November, 1948. — C.R.P. No. 1374 of 1946.

Court-fee—Suit for specific performance of a contract of sale with alternative prayer for refund of advance paid and for damages—Separate Court-fee for the alternative reliefs—If payable.

In the case of alternative reliefs arising out of the same contract only one Court-fee is payable on the relief which is more highly valued. That is the existing prac-

tice and it cannot be said in a suit for specific performance of a contract of sale with an alternative prayer for refund of the advance paid and for damages, that the claim for damages arose not out of the contract but out of the breach of contract.

T. K. Srinivasathathachariar for the Petitioner.

K. N. Karunakaran for the Government Pleader (*K. Kuttikrishna Menon*).

Respondent not represented.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Mack, J.
11th November, 1948.

Balasundram Chetty *v.* City Rationing Officer, Madras.
C.M.P. No. 3367 of 1948.

Madras Essential Articles Control and Requisitioning (Temporary Powers Act) (XIV of 1946) *and of Madras Rationing Order—Dealer in rice prosecuted for unauthorised selling of a quantity of rice—Rationing officer dealing with charge and cancelling dealer's authorisation under Food Grains Control Order when criminal case was* sub judice—*Liability of order to be quashed by* certiorari.

The City Rationing Officer did not have jurisdiction to hold that the charge against dealer for unauthorised sale of rice which formed the subject matter of a criminal case before a competent Magistrate was proved to his satisfaction and cancelling the dealer's authorisation under Food Grains Control Order before the criminal case was disposed of. As long as that case was *sub judice* and that fact appears on the face of his order, the rationing officer had no jurisdiction to deal with the charge himself and therefore the order must be quashed.

K. Bashyam and *R. Vijiaranga Mudaliar* for the Petitioner.

C. Doraiswami instructed by the Government Solicitor (*H. M. Small*) on behalf of the respondent.

K.S. ——— *Order quashed.*

Somasundaram, J.
12th November, 1948.

Raghavachari, *In re.*
C.A. No. 90 of 1948.

Motor Vehicles Act (IV of 1939), *sections* 116 *and* 121—*Gist of offences under.*

A car driven by the accused dashed against P. W. 1 who was going on his motor cycle and injured him. The lower Court convicted the accused for offences under sections 116 and 121 of the Motor Vehicles Act. On revision,

Held: To sustain a conviction for an offence under section 116 of the Motor Vehicles Act there must be evidence to prove the manner in which the accused was driving which could be said to be dangerous to the public having regard to the traffic in the locality, the speed at which the accused was driving and other circumstances. The evidence of the Motor Vehicles Inspector who examined the brakes after the accident that the foot brake had only 30 per cent. and hand brake 25 per cent. efficiency, while the required efficiency is 40 per cent., is not sufficient to sustain a conviction under section 121 of the Motor Vehicles Act. The defect complained of must be one calculated to render the driving of the vehicle a source of danger to persons or vehicles using such places.

V. T. Rangaswami Iyengar and *K. Kalyanasundaram* for the accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown Prosecutor on behalf of the Crown.

A.P.C. Albuquerque for P.W. 1.

K.S. ——— *Convictions set aside.*

Rajamannar, C.J. and Somasundaram, J.
15th November, 1948.

Kalahasti Chetty *v.* Balakrishnamurthy Chetty.
C. M. P. No. 5501 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12—*Appellate tribunal—Power to direct further inquiry—Subsequent events having a bearing on the question whether the landlord* bona fide *requires the premises for his occupation—If can be directed to be inquired into.*

A purchaser of a house filed an application before the Rent Controller for eviction of two tenants in occupation of portions of the premises on the ground that the portions were required for his personal occupation. The Rent Controller held that the landlord *bona fide* required the whole premises for his occupation and so passed an order for eviction against both tenants. One tenant vacated his portion but the other appealed to the Chief Judge, Court of Small Causes. It was contended that since the date of the application the landlord had got possession of several rooms in the premises he cannot be deemed to require the other portions of the house in the occupation of the appellant. The Chief Judge of the Court of Small Causes considered that this was a matter for investigation namely, whether the portion in the occupation of the landlord was sufficient for him. He therefore remanded the application for fresh disposal after determination of the question above mentioned. In a petition to quash that order it was contended that the Chief Judge, Small Causes Court, had no jurisdiction to take notice of events which happened subsequent to the application and the order of remand was therefore bad. It was also contended that he had no power to direct an investigation into the sufficiency of the portion required by the landlord.

Held, (1) as the application for eviction was based on the ground that the portions in the occupation of both the tenants, which would really be two buildings (*vide* the definition in section 2 (1) of Act XV of 1946), were required for his personal occupation it was incumbent on the Tribunals, both original and appellate to determine the question, whether the landlord required both the premises for his own occupation. In the appeal before the Small Cause Chief Judge the only question which had to be determined was whether the landlord *bona fide* required the "building" in the occupation of the appealing tenant, for his own occupation.

Section 12 of the Act gives ample power to the appellate Tribunal to direct such further inquiry as may be necessary and the Chief Judge was therefore competent to remand the application for the determination of this question. For such determination it must be also a matter for decision what portion and extent could be held to be sufficient for the landlord.

There can be no rule of thumb as to what a landlord may be said to "require," for his own occupation and it is not proper for the appellate tribunal to say in the remand order that "regard need not be had to all the conveniences of a fastidious landlord in determining the sufficiency of the vacant portion." He should have left the matter to be decided by the Rent Controller.

K. Sanjeevi Naidu for Petitioner.

Y. Venkatasubramanyam for Respondent.

K.S. *Petition dismissed.*

Panchapakesa Ayyar, J. Abdulla *v.* Patinhare Kettu Tavazhi.
27th October, 1948. C. R. P. No. 1469 of 1947.

Madras Tenants' and Ryots' Protection Act (XVII of 1946), *section* 4 (4) *and* (5)—*Power to extend time for making deposits of rent.*

Regarding the initial deposit of two years' rent, section 4 (4) of Madras Act XVII of 1946, gives the Court a power to grant in the aggregate, time for two months from the date of the order stating that the tenant was prevented by sufficient cause from making the deposit within two months. But regarding the subsequent deposit of rent for succeeding years, the Court is given an absolute discretion to grant a further period or periods not exceeding two months in the aggregate to the tenant without any order stating that he was prevented by sufficient cause from making the deposit, but in continuation of the two months' period allowed under section 4 (5). The Court should not import into a case of tenant " holding over " the terms of the lease deed regarding instalments and make the payment of each instalment of the year's rent stipulated there as a test under section 4 (5) which only speaks of " each year's rent " and does not say "or each instalment thereof". Where a tenant holding over deposits the year's rent (though he has not paid the instalments according to the original lease deed) it is sufficient to entitle him to have a stay.

C. S. Swaminathan for Petitioner.

D. A. Krishna Variar for Respondent.

K.S. ——— *Petition allowed.*

Panchapakesa Ayyar, J. Ramaswami Goundan *v.* Muthukaruppan Chettyar.
3rd November, 1948. S.A. No. 106 of 1947.

Practice—Appeal in suit which is of over Rs. 10,000 *value filed and disposed of in the District Court—Second appeal—Order directing return of appeal for presentation to High Court which alone has jurisdiction.*

Where an appeal which ought to have been filed only in the High Court (the value of the subject matter being over Rs. 10,000) as a first appeal has been filed in and disposed of by the District Court, the proper course in a second appeal against that decision is to set aside the judgment and decree of the District Judge in the appeal and direct the memorandum of appeal to be returned to the appellant for being presented to the proper Court, namely, the High Court as a first appeal. (1939) 2 M.L.J. 400 : I.L.R. 1940 Mad. 73, relied, on.

N. Sivaramakrishna Ayyar and *A. Balasubramanyan* for Appellant.

T. R. Srinivasa Ayyar for Respondent.

K.S. ——— *Appeal allowed.*

Panchapakesa Ayyar, J. Ramaswami Naicker *v.* Krishnaveni Ammal.
4th November, 1948. C.C.C. A. No. 21 of 1947.

Births, Deaths and Marriages Registration Act (VI of 1886), *section* 19 (b)—*Birth extracts—Entry of father's name—When proper—Probative value—Illegitimate children—Father alleging that children were born of other paramours—Burden of proof.*

The mother of the illegitimate children and the putative father should both go and report to the Registrar of Births and Deaths the name of the putative father before the Registrar is entitled to put in that name as the name of the father of the child provided of course he knew that it was *an illegitimate child* whose birth was being reported. Where there is nothing to show that the Registrar knew or was told, that the children whose births were registered were illegitimate and it was apparent that the Registrar therefore did not insist on the mother of the children and the putative father going together and consenting to the registration of the putative father's name, the value of the entry regarding the putative father's name

for purposes of holding him to be the real father of the children, will be considerably lessened. But the birth extracts will be admissible in evidence whatever may be the weight to be attached to it. Nor will the reduction of the mother's age by ten years be relevant for the purpose of admissibility or even weight.

In a claim by the putative father that the illegitimate children of his regular concubine were born of others, the burden of proving that is on the person alleging it. Of course in the case of husband and wife, this cannot even be proved and only impossibility of access can be proved. But even in the case of a concubine this fact must be proved, though the paramour is allowed to prove it.

S. Amudachari, D. Israel and *A. M. Krishnaswami Mudaliar* for Appellant.

T. K. Ramachandran and *T. K. Sundarajachari* for Respondent.

K.S. *Appeal dismissed.*

Mack, J.
9th November, 1948.

Satyanarayana Raju *v.* Kondayyamma.
S.A. No. 307 of 1946.

Practice—Evidence—Document exhibited without objection on the grounds of proof or admissibility or on both grounds being taken by other side—Objection if can be taken later.

Is is usual when a document is sought to be exhibited, for the other side to take objection immediately either on the grounds of proof or admissibility or on both grounds, and if such objection is not taken, the other side is entitled to act on the presumption that no such objection will be taken later on. Such documents must at the time they were exhibited in evidence be deemed to have been admitted for all purposes without any objection being taken by the defendants.

Y. Suryanarayana for Appellant.

C. V. Dikshitulu for Respondent.

K.S. *Appeal dismissed. Leave to appeal refused.*

Govinda Menon, J.
10th November, 1948.

Kuchama Naicken, *In re.*
Cr. R. C. No. 101 of 1948.
(Cr. R. P. No. 96 of 1948).

Madras Prohibition Act (VIII of 1947)*—Object of—Possession of ten drops of brandy—Prosecution for—Propriety—Applicability of maxim* de minimis non curat lex.

In a revision against conviction of the petitioner for having been in possession of ten drops of brandy,

Held, the offence is so trivial that in matters like this the maxim *de minimis non curat lex* should be applied. The object of the Prohibition Act is to prevent people from becoming intoxicated and thereby injuring themselves and the State. Prosecutions like this would rather hinder the proper administration of the Act than help in its working.

P. Basi Reddi and *M. S. Sethu* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Conviction and sentence set aside.*

Govinda Menon, J.
10th November, 1948.

Arumugha Goundar and others, *In re.*
Cr. R. C. No. 2 of 1948.
(Cr. R. P. No. 2 of 1948).

Criminal Trial—Appeal—Finding that trial Court did not consider the case of each of the accused separately—Proper procedure—Appellate Court should set aside the conviction and order a retrial and should not go into the evidence itself.

It is incumbent on the trial Court to consider the case of each of the accused separately. Where an appellate Court finds that the trial Court did not consider

the case of each of the accused separately, the appellate Court should set aside the convictions and order a retrial. The appellate Court in such a case should not take upon itself the duty of considering the evidence and confirming the conviction. It is not as if in a civil case on the evidence, the appellate Court can come to a finding, even though the trial Court did not give a specific finding on a point when the evidence was sufficient.

V. Rajagopalachariar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Sentences modified.*

Panchapagesa Sastri, J. Kasipathi *v.* Seethanna Pantulu.
11th November, 1948. C. R. P. No. 677 of 1946.

Madras Estates Land Act (*I of* 1908), *sections* 45 *and* 3 (15), *Explanation* (*inserted by Act VII of* 1934)—*Scope and effect.*

It cannot be taken that the law as found in the Explanation to section 3 (15) inserted by Amending Act VII of 1934 is merely declaratory and the Explanation therefore has no retrospective effect. In the case of adverse possession of lands before the Amending Act, the Agraharamdars cannot rely on section 45 of the Estates Land Act and claim rent in respect of such lands by tendering pattas. The object of section 45 of the Estates Land Act is to give an option to the Agraharamdar to regard a trespasser of ryoti land as a tenant and collect rent from him but it is only possible where the possession of the trespasser has not been adverse or if it was adverse it did not extend to a period beyond twelve years.

P. Somasundaram and *S. Ramamurthi* for Petitioner.

Y. Suryanarayana for Respondent.

K.S. ——— *Petition allowed.*

Mack, J. Ramanatha Chettiar *v.* Duraiswamy Chetti.
11th November, 1948. C. R. P. No. 1369 of 1946.

Court-fees—Partition suit—Assets alleged to be benami but joint family property though in the names of the wives of some of the coparceners—Court-fee for a declaration to convert such assets into joint family property—When payable.

In a partition suit in the case of assets alleged to be benami but joint family property though in the names of the wives of the coparceners unless the women come forward with independent claims to such properties as their own payment of a Court-fee for a declaration to convert such assets into joint family property is not necessary.

A. Narasimhachariar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

KS. ——— *Petition dismissed.*

(F.B.) Nathaniel, *In re.*
Rajamannar, C.J., Horwill and Rajagopalan, JJ. Cr. Appeal Nos. 169, 182 and
12th November, 1948. 183 of 1948.

Criminal Procedure Code (*V of* 1898), *section* 411-A (*introduced by Act XXVI of* 1943)—*Constitutional validity.*

Act XXVI of 1943 is a valid enactment of the Central Legislature and the appeals (against convictions and acquittals on trials held by a High Court in the exercise of its Original Criminal Jurisdiction, notwithstanding anything contained in the Letters Patent of any High Court and without prejudice to the provisions of section 449 of the Criminal Procedure Code,) provided for by section 411-A of the Criminal Procedure Code are maintainable.

Powers of the Central and Provincial Legislatures, discussed.

The Advocate-General (*K. Rajah Aiyar*) and the Public Prosecutor (*V. L. Ethiraj*) as the Crown Prosecutor on behalf of the Crown.

K. S. Jayarama Aiyar, C. R. Pattabhiraman, T. Rangaswami Aiyangar, R. Santhanam, R. J. Manickam, V. A. F. Coelho and *D. Narasaraju* for Appellants.

K.S. — *Preliminary objection overruled.*

Horwill, J. The Province of Madras *v.* Audemma.
12th November, 1948. C. R. P. No. 1430 of 1946.

Civil Procedure Code (V of 1908), *section* 151—*Court auction sale and affixing of necessary stamp on the sale certificate—Sale subsequently set aside—Application for refund of value of stamp after six months of the setting aside of the sale—Court has no inherent powers to grant refund.*

Standing Order 92 was passed by the Government amending the Madras Stamp Manual allowing a refund of stamp duty to the purchaser (when a Court auction sale is set aside) only if an application was made within six months of the setting aside of the sale. No Court has an inherent power to direct a refund of stamp duty when the application is made beyond the period fixed for the granting of a refund.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

B. V. Viswanatha Aiyar amicus curiæ for the party.

K.S. — *Petition allowed.*

Panchapakesa Ayyar, J. Krishna Rao *v.* Gangadeswarar Temple etc. by Trustees.
16th November, 1948. C. R. P. No. 909 of 1948.

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Application for leave to amend written statement—Allegations in the amendment sought for—If can be gone into without allowing the amendment.*

It is desirable that the proper procedure should be followed in all proceedings in public interests and that an intended amendment should not be discussed and found against even before it is allowed to be incorporated, and issues framed thereon, and evidence and arguments adduced on it.

N. C. Vijayaraghavachari and *N. C. Srinivasan* for Petitioner.

M. Chelva Aiyangar for Respondent.

K.S. — *Petition allowed conditionally.*

Rajagopalan, J. Thathi Reddi, *In re.*
17th November, 1948. Cr. R. C. No. 109 of 1948.
(Cr. R. P. No. 104 of 1948).

Madras Gaming Act (III of 1930), *section* 6—*Presumption prescribed by—Scope—If can be extended further to establish without other evidence that a specified person was the owner or keeper of the common gaming house to sustain a conviction under section* 8.

The presumption permitted by section 6 of the Madras Gaming Act can be drawn only to establish that the house in question was a common gaming house. It cannot be extended further to establish without further evidence that a specified person was the owner or keeper of that common gaming house. In the absence of evidence that a specified person did derive any profit from the gaming he cannot be convicted under section 8 of the Act.

A. Bhujanga Rao for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Conviction of* A-4 *under section* 8 *set aside.*

Rajamannar, C.J. and *Somasundaram, J.* Singarachariar *v.* Lakshmanan Chettiar.
17th November, 1948. S.A. No. 1629 of 1945.

Madras Civil Courts Act (*III of* 1873), *section* 14—*Suit on behalf of creditors to set aside summary order allowing a claim to attached immoveable property—Valuation for jurisdiction.*

In respect of a suit by a decree-holder for himself and on behalf of the creditors of a debtor to set aside the summary order passed on a claim petition by a stranger, claiming properties attached by the decree-holder as properties belonging to his judgment-debtor (challenging in the suit a trust deed on the strength of which the claim was based as a sham and nominal deed) section 14 of the Madras Civil Courts Act would apply and therefore for the purpose of jurisdiction the subject-matter has to be valued in the manner provided by section 7 (*v*) of the Court-Fees Act.

The market value of the properties is not the criterion for jurisdiction purposes.

T. V. Muthukrishna Aiyar and *T. E. Ramabhadrachariar* for Appellant.

A. V. Viswanatha Sastri and *K. R. Krishnaswami* for Respondents.

K.S. ——— *Appeal dismissed.*

Somasundaram, J. Venkatasubbiah, *In re.*
19th November, 1948. Cr. R. C. No. 374 of 1948.
Cr. R. P. No. 343 of 1948.

Madras General Sales Tax Act (*IX of* 1939), *section* 13 (a)—*Court convicting under—If can order payment of compounding fees by the accused.*

In sentencing an accused under section 13 (*a*) of the Madras General Sales Tax Act the Court has no power to direct the accused to pay the compounding fees as there is no provision in the General Sales Tax Act empowering the Court to direct the payment of the same. The Government can recover the compounding fee in any other manner allowed by law.

R. Ramalinga Reddy for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Order as to payment of compounding fees set aside.*

Mack, J. Sivayya *v.* Venkatachalam.
19th November, 1948. C. R. P. No. 1282 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 9 *and Order* 41, *rule* 23—*Default of plaintiff after remand of suit—Dismissal of suit—Propriety.*

The provisions of Order 9, Civil Procedure Code have no application to suits remanded on appeal under Order 41, rule 23, Civil Procedure Code. It is obligatory on the trial Court after remand by the appellate Court under Order 41, rule 23 of the Code of Civil Procedure to frame the new issue and record a finding on it on the available evidence and then pass a revised judgment against which the parties, even including the party in default, will have a right of appeal. To dismiss a suit *in toto* " for default " which has been once decreed after a full trial will be a contradiction in terms. This will apply with even more force to a decree *ex parte* after remand, merely on the ground that a defendant has defaulted in making appearance after remand.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Petitioner.

P. C. Parthasarathi for Respondent.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and *Somasundaram, J.*
22nd November, 1948.

National Motor Transport Co., Ltd. Masulipatam, *In re.*
C. M. P. No. 6995 of 1948.

Writ of Certiorari—*Jurisdiction to issue—Appellate authority having office in Madras confirming order by Regional Transport Authority, Rajahmundry—High Court has no jurisdiction to issue writ.*

An order passed by the Regional Transport Authority, Rajahmundry was confirmed by the Central Road Traffic Board which has its office in Madras. In an application to the High Court to issue a writ of *certiorari* to quash the proceedings,

Held, the application was not maintainable. No part of the subject-matter is situated within the local limits of the Original Jurisdiction of the High Court and the High Court cannot quash the order of the Regional Transport Authority. The fact that the Appellate Authority has its office in Madras will not make any difference in the legal position.

P. Ram Reddi for Petitioner.

K.S. — *Application dismissed.*

Rajamannar, C.J. and *Somasundaram, J.*
23rd November, 1948.

Govindaswami Chetty *v.* Third Judge, Court of Small Causes, Madras.
C. M. P. No. 4888 of 1948.

Madras Buildings (Lease and Rent Control) Act (XV of 1946)—*Appellate tribunal has no jurisdiction to order eviction on a ground which was not even mentioned in the application for eviction.*

The appellate tribunal under Act XV of 1946 has no jurisdiction to order eviction on a ground which was not even mentioned in the landlord's application for eviction.

V. Radhakrishnayya for Petitioner.

N. C. Raghavachari for Respondent.

K.S. — *Order quashed.*

Rajagopalan, J.
25th November, 1948.

Polayya and others, *In re.*
Cr.R.C. No. 475 of 1948.
(Cr.R.P. No. 444 of 1948).

Penal Code (XLV of 1860), *section* 105—*Private defence—Limits to right of.*

Persons in possession of land have a right to eject trespassers who attempt to plough the land and they are entitled to use the minimum force that is necessary for the purpose. The presence of hurt which constituted grievous hurt is not relevant at all in considering the question at issue.

U. Sethumathava Rao, K. Kameswara Rao and *N. Ramamohan Rao* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. — *Petition allowed.*

Rajagopalan, J.
26th November, 1948.

Krishnamraju, *In re.*
Cr.R.C. No. 51 of 1948.
(Cr.R.P. No. 48 of 1948).

Madras Rationing Order, Madras Foodgrains Control Order and Madras Rice Mills Licensing Order—Contravention by not keeping correct accounts of stock—Liability of employees.

Employees left in actual conduct of the affairs and business of a rice mill who fail to maintain correct accounts of the stock of paddy, are equally liable with their employers for contravention of the provisions of the Madras Rationing Order, Food grains Control Order and Rice Mills Licensing Order and are punishable under section 8 of Act XXIV of 1946. They must be deemed to have abetted the incorrect maintenance of the accounts.

V. S. Chandrasekaran for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. — *Petition dismissed.*

Mack, J. Kondiah Chetty *v.* Venkataswamy.
C. R. P. No. 119 of 1947.

Civil Procedure Code (*V of* 1908), *section* 115—*Finding of fact—Lower Courts failing to adequately consider material documents—Interference in revision.*

Where material documents have not been adequately considered by the lower Courts, the High Court can interfere in revision.

K. Umamaheswaram and *K. Sundararajan* for Petitioner.

C. A. Vaidyalingam and *P. Venkataswami* for Respondents.

K.S. *Petition allowed in part.*

Satyanarayana Rao and *Panchapagesa Sastri, JJ.* Rangacharyulu *v.*
11*th November,* 1948. Venkatanarasimhayya.
C. R. P. Nos. 1341 of 1946, etc.

Madras Hindu Religious Endowments Act (*II of* 1927), *as amended by* (*Act X of* 1946), *section* 78—*Scope—Certificate granted by the Board before any rules for the issue of such certificates were prescribed by the Local Government—Not sufficient to support an application under section* 78—*Enquiry under section* 78—*Scope.*

Applications were filed in the District Court of Guntur and Kistna under section 78 of the Madras Hindu Religious Endowments Act as amended by Act X of 1946 for recovery of possession of lands in the possession of archakas on the ground that they were Temple properties and in support of their applications filed certificates as required by section 78 of the Act, granted by the Board and it was contended by the archakas who were the contesting respondents that the certificates were invalid as they were not prescribed according to the rules framed by the Government under its rule making power (*see* section 71). The objections were overruled by the lower Courts. On revision,

Held, that (*i*) the applications to the lower Court were not maintainable ; (*ii*) the production of a certificate as may be prescribed by the Local Government was mandatory and a condition precedent to the institution of the applications and therefore the production of a certificate granted by the Board was not sufficient. The Board has no power of issuing a certificate by itself. The power is to issue a certificate in the manner as may be prescribed. The non-exercise of the power of prescribing the form by the Provincial Government would not confer the power to issue certificates, on the Board. (*iii*) Under section 78 of the Hindu Religious Endowments Act the scope of inquiry is narrowed down and it can apply only against dismissed trustees or officers or servants of the temple or those claiming under them and only in respect of admitted endowments but not to cases where archakas in possession for more than a century were sought to be dispossessed.

However the amended section 78 has no application to an application filed before the date of the amendment as the amendment has no retrospective operation and will not affect existing right to recover property.

P. Somasundaram and *P. Suryanarayana* for Petitioners.

P. Chandra Reddy, K. Venkataratnam, O. Chinnappareddi, V. Subramanyam, A. Bhujanga Rao, D. R. Krishna Rao, C. A. Vaidyalingam, T. Venkatadri, D. Munikannayya and *D. Bhimayya* for Respondents.

K.S. *C.R.P. No.* 1341 *of* 1946 *dismissed, the other petitions allowed.*

Panchapakesa Ayyar, J. Somaraju *v.* Veerraju.
12*th November,* 1948. S .A. No. 318 of 1946.

Easements Act (*V of* 1882), *section* 45—*Plaintiff's easementary right to support his tiled shed on defendant's wall—Plaint not asserting that the easement right was by grant and enjoyment for* 80 *years—If negatives presumption of lost grant—Destruction of wall by cyclone—If extinguishes the easement right.*

Though a plaintiff claimed a wall as belonging to him but it is found that the wall has been sold to the defendant with a portion of the property it must be presumed that there was an express or implied grant at the time of the sale to the defendant by the plaintiff's ancestors of a right of the plaintiffs to support their tiled shed on that wall. The mere fact that the plaint did not expressly

assert that the easementary right was by grant or by presumption of lost grant and emphasised the duration of the 70 to 80 years for the enjoyment, will not negative the presumption of lost grant and the legal origin of the easementary right. The easement cannot be held to be extinguished by the destruction of the wall and the shed completely by a cyclone or that unless the wall was reconstructed within 20 years the easement right will be lost. A suit by the plaintiff for declaration of his right can be filed within 12 years and the plaintiff can be permitted to rebuild the wall at his own cost and exercise his right of easement.

D. Narasaraju for Appellants.

G. Chandrasekhara Sastri for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Rajagopalan, J. Ramachandra Chettiar *v.* Kandaswami Pillai.
12th November, 1948. C. R. P. No. 1026 of 1947.

Practice—Partition suit—Preliminary decree providing "that plaintiff be entitled to a half share in the plaint A schedule items 1 *to* 5 *on payment into Court within six months from that date Rs.* 1,102-5-0 *with interest till date of payment"—Amount not paid in time—Power of Court to extend time for payment.*

A preliminary decree in a partition suit provided "that the plaintiff be entitled to a half share in the plaint A schedule items 1 to 5 on payment into Court within six months from the date of decree Rs. 1,102-5-0 with interest thereon at six per cent. per annum from date of plaint till payment." The amount was not paid within the six months of the decree of the trial Court. There was an appeal and within six months of the appellate decree the plaintiff deposited the amount into Court and applied for permission to deposit the amount due under the preliminary decree and the trial Judge granted a week's time. On revision,

Held, as the decree was of a preliminary nature the Court has full power over the action and has jurisdiction to extend the time for payment.

K. S. Desikan for Petitioner.

P. S. Sarangapani Aiyangar for Respondent.

K.S. ——— *Petition dismissed.*

Panchapakesa Ayyar, J. Satyanarayana *v.* Achayamma.
15th November, 1948. S. A. No. 308 of 1946.

Hindu Law—Will leaving fraction of property to mother and after her to testator's wife and daughter—Authority under the will to widow to adopt—Adoption by widow—If divests the property given to the widow and daughter.

No estate which has become vested before the adoption will become divested after the adoption by the testator's widow, where only fractions considered reasonable by the testator for the maintenance of his virtuous wife and infant daughter are bequeathed and not the entire estate leaving nothing for the adopted son, except the obligation to perform funeral rites. The widow and daughter get only a life estate under the will.

N. Subramaniam and *N. Sitarama Sastri* for Appellant.

V. Rangachari for Respondent.

K.S. ——— *Appeal dismissed. Leave granted.*

Satyanarayana Rao, J. Karuppaswamy Goundar *v.* Krishnaswamy Goundar.
15th November, 1948. A. A. A. O. No. 1 of 1947.

Madras Co-operative Societies Act (VI of 1932), *section* 57-A—*Power of Registrar of Co-operative Societies to sell property in pursuance of mortgage decree without an order of transfer of the decree from the Civil Court which passed the decree.*

The Registrar of Co-operative societies has the power to sell property in pursuance of a mortgage decree even without an order of transfer of the decree from the Civil Court which passed the decree.

N. Sivaramakrishna Aiyar and *A. Balasubramania Aiyar* for Appellant.

A. C. Sampath Aiyangar and *S. Krishnamachariar* for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Subba Rao, J. Subba Naicker *v.* Subbaram Naicker.
16th November, 1948. A. A. A. O. No. 305 of 1946.

Hindu Law—Pre-partition debt of father—Merger into promissory note after partition —Property got in partition by the son—If liable.

Property got by a son in partition is liable for a pre-partition debt of the father. If the pre-partition debt loses its identity and merges in a new cause of action that arose after the partition there would be no pre-partition debt at all and therefore family property in the hands of the son obtained on partition could not be made liable for the debt.

54 M.L.J. 726 : I.L.R. 51 Mad. 361, followed.

C. S. Rajappa for Appellant.

T. P. Gopalakrishna Aiyar for Respondent.

K.S. *Appeal allowed in part. Leave refused.*

Horwill and *Govinda Menon, JJ.* Markandeyulu *v.* The East India Distilleries and Sugar Factories, Ltd.
17th November, 1948. O. S. A. No. 44 of 1948.

Industrial Disputes Act (XIV of 1947), *section* 2 (k)*—Scope—Industrial dispute—What is.*

Read in its widest terms, the terms "industrial dispute" in section 2 (*k*) of the Industrial Disputes Act would mean that any matter however trivial and however unrelated it might be to the working of the industry would fall within the definition of an industrial dispute. The dispute must be one between the employer and employee as such.

Powers of Industrial Tribunal considered.

Desirability of bringing up the question of the limits of the Tribunal's powers for consideration by Courts after the award has been made pointed out.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

Messrs. King and Partridge and *R. Venkataraman* for Respondents.

K.S. *Appeal allowed.*

Horwill and *Govinda Menon, JJ.* Baktavatsalu Naidu *v.* Chrome Leather Co. Ltd.
17th November, 1948. O. S. A. No. 45 of 1948.

Industrial Disputes Act (XIV of 1947)*—Scope and purpose of—Tribunal under Act —Powers to settle disputes—Limits—Disputes outside scope of existing contracts—If can be adjudicated on.*

The purpose of the legislation enacted in Act XIV of 1947 is to settle disputes that arise between the workers and the management which, if not settled, would result in a strike or lock out and dislocation of business essential to the life of the community. It is very rarely that such disputes relate to the infringement of existing contracts between the management and the workmen. The workmen agitate and make demands for something beyond the terms of the agreement between the parties to meet the ever advancing ideals of the public with regard to the conditions under which the employees should work.

A decision by a Judge in excess of his powers of settling a dispute between the parties by granting to employees what he thought fair and reasonable, outside the terms of the existing contract, enforcing terms which he thought necessary to preserve industrial peace and in consonance with the present public opinion would not be any the less an adjudication as if he were deciding a question of law and fact in an ordinary civil suit.

Various heads of dispute which are "individual" discussed.

Industrial Tribunals can order the reinstatement of a dismissed workman.

If persons strike in pursuance of an industrial dispute, the termination of their services makes them "dismissed workmen" who are entitled to have their disputes with their employers adjudicated upon under the Act.

The granting of bonuses, gratuities, pensions, pongal presents and the like to employees is not out of charity and they will properly form the heads of dispute which the Industrial Tribunal can consider.

Disputes as to provision of houses, re-opening of a school, provision of text-books and other amenities can also be settled by the Industrial Tribunal.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

Messrs. King and Partridge and *A. Ramachandran* for *Messrs Row and Reddy* for Respondent.

K.S. ——— *Appeal allowed.*

Mack, J. Vedachala Reddi *v.* Narayanaswami Reddy.
18*th November*, 1948. C. R. P. No. 1409 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 32, *rule* 1, *Order* 33, *rule* 5 (d-1)—*Application by new next friend of minor for leave to sue* in forma pauperis—*Barred by Order* 9, *rule* 9 *where previous suit by another next friend has been dismissed for default.*

Necessity for Court control over such next friends and desirable procedure for same pointed out.

An application by a new next friend of a Hindu minor under Order 32, rule 1, Civil Procedure Code to set aside an alienation by the minor's father must be rejected under Order 33, rule 5 (*d*-1) as it is barred by Order 9, rule 9, Civil Procedure Code in view of the dismissal for default of a previous suit on behalf of the same minor by another next friend for the same relief. Suits by next friends who can crop up under the provisions of Order 32, rule 1, Civil Procedure Code as it stands are often filed without any sense of responsibility. There is little or no control over these next friends who can bring to Court a large number of defendants, alienees in such suits. It is desirable to exercise some Court control over next friends who file this type of suit by requiring them first to be appointed as property guardians of the minors in whose interests they purport to act. This will result in some Court control over such litigation and would also be in the real interests of the minors themselves.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Petitioner.

K. R. Krishnaswami Aiyar and *S. P. Subramaniam* for Respondent.

K.S. ——— *Petition dismissed.*

Mack, J. Krishnamurthi *v.* Narayanamurthi.
19*th November*, 1948. C. R. P. No. 990 of 1947.

Court-fee—Suit with prayer for specific performance of a contract to asssign immovable property and for damages for non-delivery and in the alternative damages—Reliefs arise out of same contract and are not distinct reliefs for Court-fee purposes—Court-fees Act, S. 17.

In a suit for specific performance including a prayer for damages for non-delivery and in the alternative damages, the reliefs arise out of the same contract and it is not possible to differentiate between a relief from a contract and a relief arising out of a breach of the same contract. Accordingly the prayer for damages for breach need not be valued separately for Court-fees.

K. Kameswara Rao and *C. V. Narasimha Rao* for Petitioner.

The Government Pleader (*K. Kuttikishna Menon*) for the Government and. *M.A. Narasayya* for the Respondent.

K.S. ——— *Petition allowed in part.*

Horwill and *Govinda Menon, JJ.* Kasi Viswanathan, *In re.*
19*th November*, 1948. Cr. M. P. No. 2093 of 1948.

Criminal Procedure Code (*V of* 1898), *section* 411-A—*Application for leave to appeal under—Desirability of considering question of misdirection to jury in the presence of Crown Prosecutor before admitting appeal on a question of fact.*

It is a desirable practice that those desiring to appeal under section 411-A of the Criminal Procedure Code should first ask leave of the trial Judge himself; for he alone is intimately acquainted with the details of the evidence and is therefore

in a position to appreciate any arguments the learned counsel might adduce in support of the application for leave to appeal. The Court of Appeal would then, if it were moved, have the advantage of knowing the opinion of the trial Judge on the merits of such application. When the matter comes before the Court of Appeal it will be of advantage that the Crown Prosecutor should be present; so that the Court might have the advantage of hearing his reply to any points that might be raised in the arguments on behalf of the petitioner. The Court must satisfy itself that there has been a misdirection to the jury which might have led to a miscarriage of justice before admitting an appeal on a question of fact.

J. Nargunam and *Mrs. E. S. Azariah* for Petitioner.

The Crown Prosecutor (*S. Govind Swaminathan*) on behalf of the Crown.

K.S. ——— *Application dismissed.*

Horwill and *Govinda Menon, JJ.* Makku Naicker *v.* Agathiappa Goundar.
23rd November, 1948. C. R. P. No. 1774 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 7—*Dismissal of application to set aside order declaring defendant* ex parte—*Defendant if entitled to file written statement and take part in the case.*

Where an application by defendant to set aside an order declaring him *ex parte* has been dismissed the defendant has no right to file a written statement the time for filing which had already elapsed. Such defendant is not precluded from participating in the future proceedings of the Court but not in what was past. Since the stage for filing written statements and framing issues had been passed no fresh written statement could be filed as of right.

49 M.L.J. 273, followed; (1939) 1 M.L.J. 64, considered and not followed.

T. P. Gopalakrishnan for Petitioner.

C. A. Seshagiri Sastri for Respondent.

K.S. ——— *Petition dismissed.*

Subba Rao, J. Ramachar *v.* Krishnamachar.
24th November, 1948. C. R. P. No. 817-A of 1947.

Civil Procedure Code (*V of* 1908), *Order* 26, *rule* 10 (3)—*Appointment of second Commissioner—Proper procedure for.*

A Commissioner appointed at the plaintiff's instance filed a report to which both parties filed objections. The suit was dismissed and the defendant preferred an appeal in which the suit was remanded to the trial Court. After remand the plaintiff filed another petition for the appointment of a Commissioner alleging that the first Commissioner did not measure the land in dispute while the defendant stated that the Commissioner did measure the land. The Munsiff without considering the merits of the application and without giving any reasons why the previous Commissioner's report should be ignored appointed a fresh Commissioner as he thought it was necessary in the interests of justice. On revision,

Held, the procedure adopted is not only contrary to the express provisions of Order 26, rule 10 (3), Civil Procedure Code but condemned more than once by the High Court. A second commission should not be issued unless it was thought that the report of the first Commissioner was not satisfactory, in which case the earlier commission should have been wiped out altogether.

I.L.R. 54 Mad. 239, followed.

A. Bhujanga Rao and *D. R. Krishna Rao* for Petitioner.

C. S. Swaminathan for Respondent.

K.S. ——— *Petition allowed.*

Horwill and *Govinda Menon, JJ.* Easwaran, *In re.*
25th November, 1948. Cr. M. P. Nos. 2128 to 2131 of 1948.

Madras Maintenance of Public Order Act (*I of* 1947), *section* 3 (5)—*Duty of Government to pass final order under—Failure of Government to pass final order—Will render detention unlawful.*

It is the duty of the Government to pass a final order under section 3 (5) of the Maintenance of Public Order Act (confirming, modifying or cancelling an order of detention made) under section 2 (1) after the Advisory Council has

considered the materials placed before it and submitted its report. If the Government does not conform with the requirements of section 3 (5) and pass a final order the detention of the persons concerned will be unlawful and will entitle them to come before the High Court.

A. K. Pillai, N. S. Mani and *G. Gopalakrishnan* for *Messrs. Row and Reddy* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. —————— *Petitions dismissed.*

Panchapakesa Ayyar, J. Padmavatamma *v.* Bheemacharyulu.
25th November, 1948. S. A. No. 866 of 1946.

Hindu Law—Stridhanam—Successions—Married daughter without children—Does not exclude daughter with children.

Where all the married daughters are equally indigent, the one without children will not exclude the one with children from succession to their mother's stridhanam property under the Mitakshara. They take equally and together.

Ch. Raghava Rao for Appellant.

V. Ramanujachari, K. N. Srinivasan, P. Somasundaram and *E. Subramaniam* for Respondents.

K.S. —————— *Appeal allowed. Leave to appeal granted.*

Viswanatha Sastri, J. Varadachariar *v.* Srinivasaraghavachariar.
26th November, 1948. C.R.P. No. 858 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 33—*Application for leave to sue as pauper—Omission to disclose as assets his deposit of Rs.* 150 *with the Agricultural Demonstrator as security for proper discharge of the duties—Effect.*

The omission to disclose as his assets a deposit of Rs. 150 with the Agricultural Demonstrator as security for the due and proper discharge of his duties by the petitioner for leave to sue as a pauper, cannot be said to be *mala fide* as the amount was not available as ready money to be paid into Court or to be utilised by the petitioner.

V. C. Viraraghavan for Petitioner.

K. Sankara Sastri and *G. N. Rangaswami* for Respondent.

K.S. —————— *Petition allowed.*

Rajagopalan, J. Public Prosecutor *v.* Sriranganayakulu.
26th November, 1948. Cr.A. No. 348 of 1948.

Madras Prevention of Adulteration Act (*III of* 1918), *section* 5 (1) (d) *and* (b)—*Honey mixed with* 38 *per cent. of cane sugar—Sale of—Offence—Absence of rules under section* 20 (1) (e)—*Effect.*

The sale of honey mixed with 38 per cent. of cane sugar is an offence punishable under section 5 (1) (*d*) of Madras Act III of 1918. The fact that the buyer had not paid the price as the sanitary inspector took the honey sold did not make it any the less a "sale." In any event the accused will be punishable under section 5 (1) (*b*) for offering it for sale. The fact that no rules had been prescribed under section 20 (1) (*e*) of the Act by the Government in no way affects the liability of the accused for punishment. If no such rules were framed the only reasonable inference could be that honey of an absolute purity had to be sold unless what was sold or offered to be sold was represented to the purchaser to be not honey, but honey with an admixture of cane sugar. Cane sugar might be innocuous material but 38 per cent. of it did certainly increase the bulk, weight or moisture of the honey within the meaning of the proviso to section 5 (1) and in the circumstances of the case fraudulent intention was obvious.

The Public Prosecutor (*V. L. Ethiraj*) the appellant in person.

Kasturi Sivaprasada Rao for Respondent.

K.S. —————— *Order of acquittal set aside*

Somasundaram, J.
26*th November*, 1948.

The Public Prosecutor *v.* Desigan.
Cr. A. No. 347 of 1947.

Criminal Procedure Code (*V of* 1898), *sections* 414 *and* 260—*Summary conviction under section* 260 *for offence under Rationing Order* (*a special Act*) *and sentence of fine of Rs.* 100—*No appeal lies.*

Under section 414, Criminal Procedure Code, no appeal lies against a sentence of fine of Rs. 100 when an accused is convicted summarily under section 260, Criminal Procedure Code. It cannot be said that section 414 applies only to cases of conviction of offences mentioned in section 260 and not for offences under a special Act (as Act XXIV of 1946 and Rationing Preparatory Measures Order).

The Public Prosecutor (*V. L. Ethiraj*) in person.

G. N. Chari for Respondent.

K.S. ——— *Petition allowed.*

Rajagopalan, J.
26*th November*, 1948.

Tonse, *In re.*
Crl. M. P. No. 1906 of 1948.

Indian Penal Code (*XLV of* 1860), *section* 4 *and Criminal Porcedure Code* (*V of* 1898), *section* 188—*Subject of Dominion of India committing offence in Native State before* 15*th August*, 1947—*Prosecution in Court of Madras Province after accession of the State and the Indian Independence Act*—*Leave under section* 205 *of Government of India Act*—*Not available when there is no final adjudication.*

For offences committed in Travancore and Cochin (which were outside British India when the offences were alleged to have been committed) subjects of the Dominion of India resident in a Province (in this case Madras) can be tried and punished after such States had become a part of the Dominion by accession. Such offences are punishable under section 4 (1), Indian Penal Code as it stood on the date the offences were alleged to have been committed provided the requirements of section 188, Criminal Procedure Code were satisfied. A prosecution based on a sanction by the Madras Government given on 25th May, 1948, is sustainable in a Court in the Madras Province.

Section 4 (1) of the Indian Penal Code and section 188, Criminal Procedure Code cannot be viewed as wholly extra-territorial in the restricted sense in that it provides for punishment of offences committed by the British subject of Indian domicile resident in a Province for offences committed by him outside that Province.

Leave under section 205 (1) of the Government of India Act refused as there had been no final adjudication of the liability in criminal law of the accused.

1948 M.W.N. (Cr.) 41, relied on.

M. K. Nambiar and *M. Sekhara Menon* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Rajagopalan, J.
26*th November*, 1948.

Bhimaraju, *In re.*
Cr. R. C. No. 286 of 1948.
(Cr. R. P. No. 209 of 1948).

Madras Prevention of Adulteration Act (*III of* 1918), *section* 20 (2) (f)—*Rules under*—*Rule* 27-A—Intra vires.

Rule 27-A of the rules framed under section 20 (2) (*f*) of the Madras Prevention of Adulteration Act is *intra vires* and its scope was well within the rule making power of section 20 (2) (*f*). It was not necessary that that rule should be applied only to articles offered for sale as food.

N. Subramanyam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Panchapakesa Sastry, J. Damodara Goundan *v.* Guruswami Goundan.
26th November, 1948. A. A. A. O. No. 321 of 1946.

Limitation Act (IX of 1908), *Article* 182 (5)—*Final Order—Application represented after lapse of time granted without complying with directions—Dismissal—If "final order."*

Where an execution application was represented beyond the time granted without producing a vesting order but with an endorsement that "the application may be numbered and closed to enable the petitioner to renew the application later" and an order was passed "the petitioner has deliberately disobeyed the Court's instructions to apply for enlargement of time. The petition is therefore rejected."

Held, that that execution petition must be treated as not having the status of an execution petition at all and it must be deemed to have been rejected on that ground and as the application was not in accordance with law there is no "final order" which is the starting point of limitation for a fresh execution petition.

(Case-law considered).

T. V. Ramanatha Aiyar and *T. S. Venkatarama Aiyar* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

Appeal dismissed but leave granted in view of conflict of decisions.

K.S.

Viswanatha Sastri, J. Veerayamma *v.* Ammireddi.
2nd December, 1948. C. R. P. No. 745 of 1947.

Hindu Law—Joint family—Promissory note in favour of son in respect of debt due to family—Death of the holder—The father as manager if can give a valid discharge—Wife as legal representative if can sue after father has given discharge.

The person to whom payment should be made in order to discharge the maker of the note from liability under a promissory note is the "holder" of the note as defined in section 8 of the Negotiable Instruments Act. It is only the payees named in the instrument or their endorsees that can be said to be "holders" and undisclosed principals and beneficial owners of the debt are not entitled to sue the maker of the note. Notwithstanding the fact that the money lent under a note was advanced from family funds, if the promissory note is taken in the name of the son, he alone would be the holder and when he was alive he alone could have sued on the note and not the father. But where the son died the father as manager of the family to whom the debt survived can receive payment from the debtor and give a discharge without reference to the son's widow who would be his legal representative and the widow cannot then sue on the promissory note.

B. Srinivasamurthy for Petitioner.

M. S. Ramachandra Rao for Respondent.

K.S. *Petition dismissed.*

Panchapakesa Ayyar, J. Pakkiri Mahomed Rowther *v.* Chandrasekhara Iyer.
3rd December, 1948. A. A. A. O. No. 182 of 1947.

Madras Debt Conciliation Act (XI of 1936), *section* 14 (2)—*Award having effect of a decree on registration—Limitation for execution—Limitation Act (IX of* 1908), *Article* 182.

Where an award under the Debt Conciliation Act takes effect as if it were a decree of a civil Court on its registration the period of limitation for executing that decree is six years under Article 182 of the Limitation Act and not three years from the date of registration.

T. S. Venkatarama Aiyar for Appellant.

N. R. Govindachari for Respondent.

K.S. *Appeal dismissed. Leave granted.*

End of (1948) II M.L.J.